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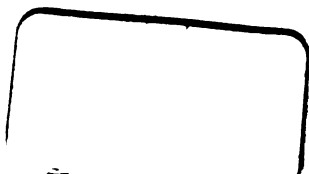
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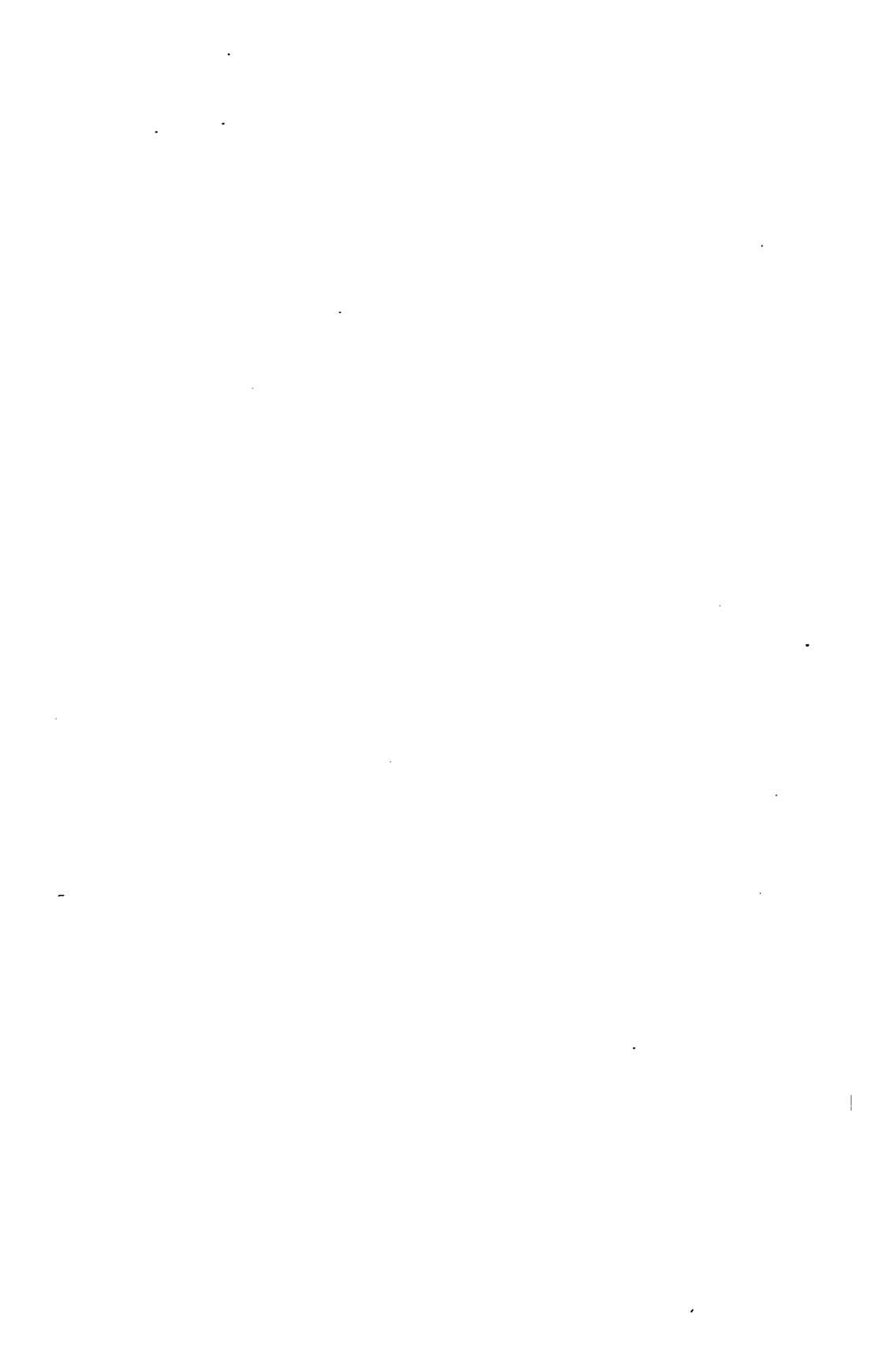


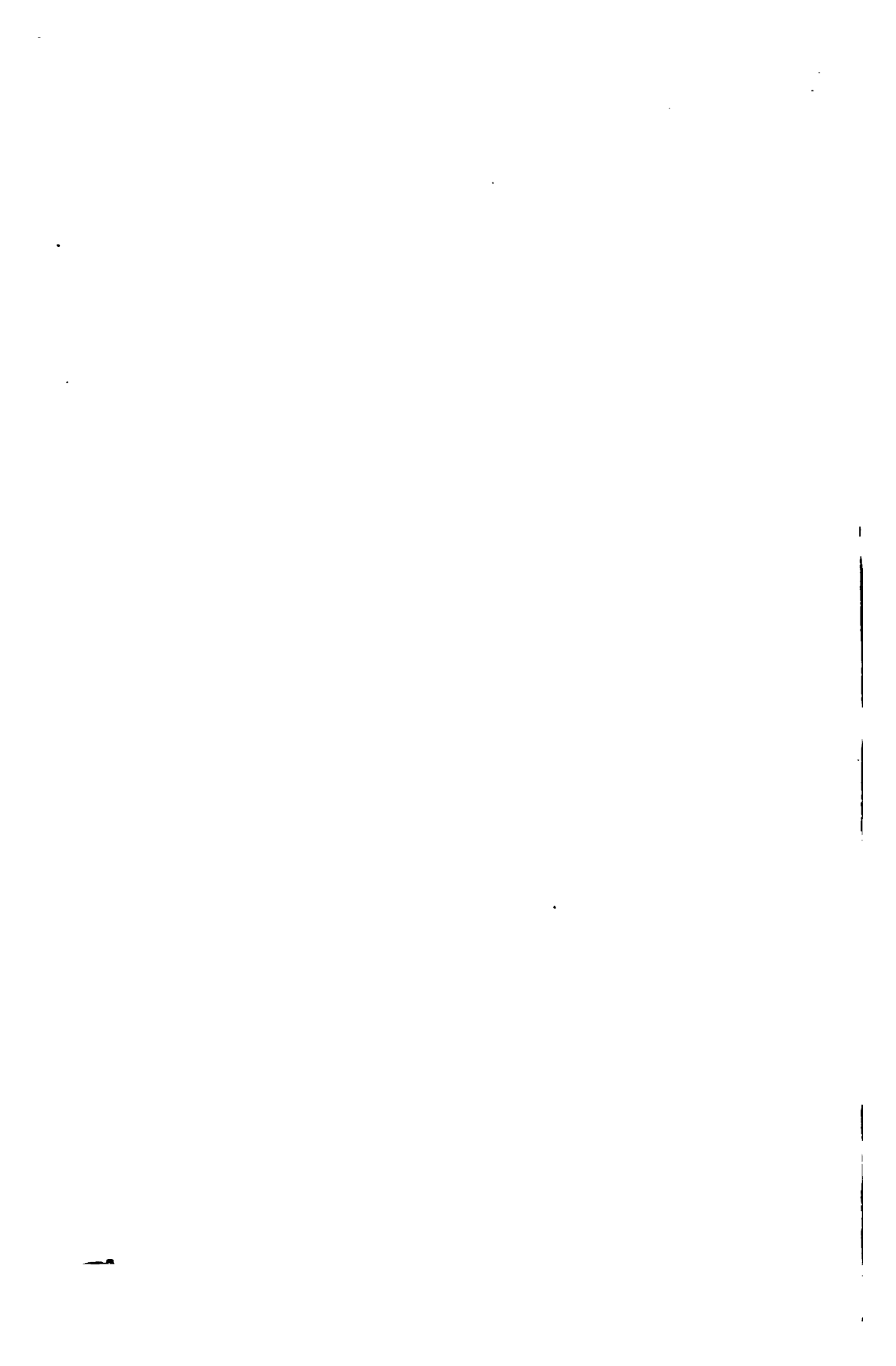
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LEADING CASES
OF THE
COURT OF CIVIL APPEALS
OF THE
STATE OF TENNESSEE
WITH
SYLLABI AND NOTES

By
JOSEPH C. HIGGINS
Associate Justice.

VOL. IV.

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OF TENNESSEE.**

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‡Elected to succeed Chas. T. Cates, Jr., resigned.

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LEADING CASES
ARGUED AND DETERMINED
IN THE
COURT OF CIVIL APPEALS
OF THE
STATE OF TENNESSEE

L. & N. RAILROAD v. R. J. KOONCE.

Writ of certiorari denied by the Supreme Court.

(Jackson. April Term, 1914.)

- 1. MOTION FOR NEW TRIAL.** *Hearing of when questions of fact involved. Bill of exceptions.*

Rule reannounced that the bill of exceptions must disclose the fact that it contains all the evidence heard by the trial judge while considering a motion for a new trial.

- 2. TRIAL.** *Physical examination of injured plaintiff. Demand.*

In order to put a trial judge in error, if it be error, in refusing to require an injured plaintiff to submit to a physical examination during the trial, the demand must be specific, unequivocal and timely.

- 3. SAME.** *Power and duty of the court to order.*

Trial judges in this State, in proper cases and under reasonable restrictions, and where deemed necessary to prevent fraud or injustice, have power to order a plaintiff suing for bodily injuries to be examined by medical experts.

Railroad v. Koonce.

4. *SAME. Discretion. Review.*

Such a motion is addressed to the sound discretion of the trial judge, but his discretion is subject to review.

FROM HAYWOOD COUNTY.

Appeal in error from the Circuit Court of Haywood County. THOS. E. HARWOOD, Judge.

J. W. E. MOORE & SON for Plaintiff in Error.

KINNEY & WILLS for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS cause is before us on the appeal of the Louisville & Nashville Railroad Company from a judgment against it in the Circuit Court of Haywood County for \$3,500. The jury returned its verdict against the defendant company for \$7,500, but, on a motion for a new trial, the trial Judge required the plaintiff to enter a remittitur of \$4,000, and on plaintiff's failure to do so, he would grant defendant a new trial. The plaintiff, under protest, entered the remittitur, and both parties have appealed and assigned errors. It is earnestly insisted by the railroad company that the trial Judge should have directed a verdict in its favor, and also, that there is no material evidence to support the verdict of the jury. These assignments require a brief review of the testimony heard during the trial in the Court below. We deem it unnecessary to make a detailed statement of the evidence in this case, or to go at length into the facts heard during the trial. The plaintiff, Koonce, formerly lived in Bedford County, Tennessee, but for the last thirty years has resided in Tarrant County,

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Texas. In November, 1911, he decided to visit his old home in Tennessee, and about the 8th of that month, started on a journey to Normandy, in Bedford County. Reaching Memphis, he took passage on the Louisville & Nashville train, and when near Brownsville, Tennessee, it collided with a freight train, doing great injury to some of the cars in the passenger train, injuring a number of people and killing perhaps one or more. The plaintiff, Koonce, was riding in the rear passenger car, and claims to have been hurt by this collision. He states that it occurred about ten o'clock P.M., and that just before it happened, he was preparing to lie down on two seats with the purpose of going to sleep. He had turned the back of the seat in front of him, and was standing between the two seats, and had just placed his suitcase, or grip, on the rear seat to be used as a pillow, when the collision occurred. He was knocked across the right arm of one of these seats, striking it near the rear of his right side, falling on his shoulder and head in the aisle, between the row of seats. The proof is not definite as to what particular place on his right side hit the arm of the seat; but we take it that it was somewhere above the lower ribs and nearly midway between the backbone and the middle line of the front of the body. While he felt that he was hurt by this fall, he did not at first think it would amount to much, but thought the pain would soon pass off, and for that reason said little, if anything, about it, and did not consult a physician to ascertain the extent of his injury or to prescribe a remedy therefor. After the collision the train remained at Brownsville until the next morning about nine o'clock, when the obstruction on the track was removed, and it went on to McKenzie, Tennessee. The car in which plaintiff was traveling was there switched to the track of the N., C. & St. L. Railroad Co., and attached to one of its trains and carried to Nash-

Railroad v. Koonce.

ville. When it reached Nashville, plaintiff changed cars to a train going to Normandy, remaining in Nashville about thirty minutes. He reached Normandy that afternoon, and was able to walk to the home of his nephew, about seventy-five yards from the depot, though it appears that he was not able to carry his grip, which was carried for him by a one-arm gentleman. He remained at his nephew's house a short time, and the same evening walked about two hundred and fifty yards to his brother's house, where he stayed a few days and then went in a buggy, to the house of his sister, two or three miles in the country, and remained there some time. While at this sister's house, he felt some pain in that part of his side, where he was struck when he fell, and for several days thereafter the discharge from his bowels was bloody, accompanied by pains. He then went to the home of another sister, seven or eight miles in the country, and remained in Bedford County visiting his kins folks, until the 29th of January, 1912. While in that section of Tennessee he felt badly, as the result of his injury, but still believing that it was only temporary, he failed to consult a physician. Once or twice he started rabbit hunting, but went only a short distance, and finding he was unable to stand the trip, returned to the house. While on this visit in Bedford County he wrote to his nephew in Texas several times about the injury he received, and complained of being hurt. After reaching his home in Texas, about the latter part of January, 1912, he was forced, on account of the injury received in the collision, to go to bed and send for a doctor to prescribe for him. It appears reasonably clear from his testimony, that from the time he was knocked down in the collision, until he returned to his home in Texas, he experienced continuous pain in his right side as a result of the injury he received in the collision; that it is also reasonably clear

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that this pain gradually grew worse, and that his physical condition likewise grew worse as the result of his injury, until the time he reached his home in January, 1912. However that may be, he felt so unwell, after reaching home, that he was compelled to take his bed and send for his family physician. This doctor found him in bed and complaining of the injury he had received in his side. He visited him a number of times, prescribing for him, but being unable to do him any good, or to benefit him in any way, told him it was not necessary for him to call to see him any further, as he could not benefit him any, and then ceased his visits. Just how long he was confined to his bed the proof does not show. When the physician called to see him, the plaintiff explained when and where he received the injury, and how it happened, and the doctor testified that at that time the plaintiff was drawn from his right side and considerably bent over to the left side. The doctor states that he will never get well, but will gradually grow worse, and that his body will continually be drawn from the right to the left side, in which position it will remain the balance of his life, however, growing worse all the time. The cause of this, as explained by the physician, is that certain muscles of the body on the right side are paralyzed by the blow received on the arm of the seat, and the result of this paralysis is to cause the same muscles on the opposite side to draw the body from an erect position, to a curved condition on the left side. There does not seem to be, according to the statement of the physician, any remedy for this, but that it will grow worse as time passes, and the plaintiff become very much deformed. At the time he received the injury he was then sixty years old. He had been a stout, able bodied, healthy man, and able to do good work. He had only had occasional spells of biliousness and malaria, but with these exceptions had been en-

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tirely' healthy and free from disease. He was a farmer, owning and working a small farm of sixty acres near Tarrant, in the county of Tarrant, Texas. Previous to the collision he had experienced no trouble with his bowels, nor pain of any kind in his side or back, and in fact had been a strong, healthy, able-bodied man, able to do any and all work necessary on his farm. Since he was injured in this collision, he has not been able to do but little, if any, work, although he has tried to at different times. He stated that he frequently made an effort to work, but the pain in his side was so great that he could not do so. He had thought perhaps he might be able to ride a plow, and in that way do something, but the jolting of the plow pained his side so much that he quit that after a short time. After receiving the injury in his side, a swollen place arose at that point, about the size of a hen egg, but how long it remained there we are unable to tell from his testimony. At the trial of the cause his body was still drawn to the left, because of the paralysis of the muscles mentioned: An eminent physician of Haywood County, who examined him during the trial, stripped him entirely of his clothing, testified that this condition would continue to grow worse, and would never, in his opinion, be better. This physician also testified that the left side, opposite where the injury was received, was about three-fourths of an inch larger than the right side of his body, and this was caused by the injury the plaintiff received in this collision. Plaintiff himself says, that as a result of the injury, he was unable to sleep well at night, because he had to lie in a twisted position; that frequently he had to get up and walk around to rest himself; and that often his lower limbs would become so numb that he had to "staump" his feet to get rid of the numbness. It is clear from the testimony of the Haywood County physician, who examined plaintiff dur-

Railroad *v.* Koonce.

ing the trial, and also from the testimony of plaintiff's family physician in Texas, that he will never recover from the injury he received in this collision, while the strongest probabilities are, and in fact both physicians say it is true, that he will gradually grow worse and become so deformed that he can accomplish little or no work. It is true neither physician say that he could not, at the time of the trial, perform any labor, and all they do say is, that he could not then do a full day's work; yet from the testimony of plaintiff himself, which is corroborated by that of his nephew, it is evident that he was unable from the time of receiving the injury, until the date of the trial of the cause, to do any work whatever. He says himself he had not been able to do any work, and it is not shown by the evidence of the defendant below that he had ever done any work of consequence since his injury. Although he had made repeated efforts to work, he says he could not, because of the pain in his side the exertion caused him. In view of the fact that both physicians who examined him say he will gradually grow worse, it is evident that he is practically incapacitated from doing manual labor, or work of any kind, on the farm. If this is not true, it is certainly true that in time, and perhaps in a very short time, the drawing of his body to the left will totally incapacitate him from doing any kind of work on his farm. He is a farmer, and has been all of his lifetime, and it is not shown that he is qualified to do any other kind of work than laboring on a farm, and it results, therefore, that as a consequence of the injury he received, he has been totally incapacitated to make a living, or to make anything in his trade or calling or avocation as a farmer, and being unfit for any other kind of work, he is unable to support himself and family in any other work. From this statement of the facts it is clear there was no error in the trial Judge in refusing to direct a verdict for

8. COURT OF CIVIL APPEALS,

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the defendant, while it is likewise true that there is ample evidence to support the finding of the jury, and for these reasons the first and second assignments are overruled.

Passing assignments numbers ten and eleven for the present, to be considered later in this opinion, we reach assignments twelve, thirteen, fourteen, fifteen, sixteen and seventeen, and these will all be considered together, as they raise practically the same question. Under these assignments it is insisted the trial Judge committed manifest error in refusing to grant defendant a new trial because of the misconduct of the jury after it retired to consider of its verdict. It is insisted the misconduct of the jury was made to clearly appear from the affidavits, and also the testimony of the jurors, which were used and heard on the motion for a new trial, while the appellee's learned counsel insists that these affidavits and this testimony of the jurors, cannot be looked to in this record, nor considered at all, for the reason that the bill of exceptions fails to show that it contains all of the evidence heard on the motion for a new trial, and for that reason this Court will conclusively presume that there was sufficient material evidence heard on the motion for a new trial, to justify or warrant the action of the Court in refusing to grant it. It seems now to be a well settled rule, that if the bill of exceptions fails to show that it contains all of the evidence heard on the motion for a new trial, the Appellate Court will conclusively presume the action of the Court justified or sustained by the evidence heard on the motion; or in other words, that there was material and competent evidence heard on the motion, which authorized and justified the action taken by him in refusing the new trial. This question first came before the Supreme Court in the case of *Ransome v. State*, 116 Tenn., 355, wherein affidavits

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were used by the defendant in a felony case as the basis of a motion to discharge a panel. A number of affidavits were introduced in that case, but the bill of exceptions failed to state that it contained all of the evidence heard by the trial Judge on the motion to discharge the panel, that being a motion to discharge the panel, or the jury, selected to try the defendant, the motion being based on the fact that there were no colored men on the jury, and that as the defendant was a colored man, he was entitled to have some of his own color on the jury. There being no colored man on the jury, he moved to have the panel discharged and a new one ordered, and supported his motion by the affidavits of a number of colored men, but the bill of exceptions failed to show that it contained all of the evidence heard by the trial Judge on the motion to discharge. Mr. Justice McAlister delivered the opinion of the Court in that case, and said, "the established rule of practice requires that it shall affirmatively appear from the bill of exceptions, that it contains all the evidence heard by the trial Judge on any plea or motion presenting disputed or controverted facts," and it not so appearing from the bill of exceptions in that case, the Supreme Court held that the trial Judge committed no error in refusing to discharge the panel. There is nothing in the opinion to indicate that there were other affidavits used on the motion, than those set out in the opinion. There is nothing in this case to indicate that there were other affidavits used, or other evidence used on the motion for a new trial, than those set out in the bill of exceptions. There was as much a controverted or disputed fact involved in the motion in *Ransome v. The State, supra*, as there was on motion for new trial in this case, and yet, the Supreme Court held that unless the bill of exceptions showed it contained

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all the evidence, they would not review the action of the trial Judge in overruling the motion. The same question came before the Supreme Court in a criminal case in the case of *Eatherly v. The State*, 118 Tenn., 371, and in the opinion delivered by Mr. Special Justice Sanson. this rule of practice was again reannounced, and it was stated in the opinoin, "that a trial Judge will not be put in error upon any ruling or judgment entered upon any question of fact, where the record fails to state affirmatively, that it contains all the evidence heard by the Court on that question, has been the settled rule of practice in this Court for so long a period of time, and has become so thoroughly ingrafted upon the jurisprudence of the States, as that it is no longer an open question. . . . Any other or different rule, or one less absolute and invariable, could but result in questionings and confusion, uncertainty and doubt; and this rule of practice must obtain in respect of every part of the record, by way of motions for new trials or otherwise, equally with the facts pertaining to the general issues. This Court can and will indulge no presumptions touching the question, either that the record is or is not full and complete." It will be observed that Mr. Justice Sanson says the trial Judge will not be put in error upon any ruling or judgment entered upon any question of fact where the record fails to state affirmatively that it contains all the evidence heard by the Court on that question. This record fails to state affirmatively that it contains all the evidence heard by the Court on the motion for a new trial, and we cannot indulge any presumption that it is or is not a full and complete record. We are bound to assume and to presume, that the evidence before the trial Judge sustained his ruling upon the motion for a new trial, and this being the rule by which we must be governed, we

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cannot review the evidence heard on the motion for a new trial, in order to determine whether the jury was or was not guilty of misconduct after it retired to consider of its verdict, and for these reasons these assignments are overruled.

Under the eleventh assignment, it is insisted that the Court erred in refusing to order the plaintiff below to submit to an examination by expert physicians and surgeons upon the motion of the defendant therefor, the defendant offering to pay the surgeon and physician for such examination. This assignment raises the most important legal question involved in this record, and in order to fully understand the facts bearing upon the question, raised in the assignment, it is necessary, in this connection, to state what the record shows was done in the Court below, in reference to the motion, claimed in this assignment to have been made in the Court below. While the plaintiff was being cross-examined, he was asked by the defendant's learned counsel this question: "Would you be willing to allow me to employ a good and competent physician—I don't know whether it would be competent or not, Your Honor—to examine you?" The Court: "It is too late now, as we are trying the case." Mr. Moore: "If they object to it, I don't know as I have a right to it, but we would like to have him examined by a competent physician."

This is all that occurred at this time, and this took place at the close of the cross-examination of plaintiff by defendant's counsel. We could not hold that this constituted, or was a motion made to the Court to be permitted to have the plaintiff examined by expert physicians. After this, plaintiff's counsel then re-examined him, and after such re-examination was closed, defendant's learned counsel re-cross-examined the plaintiff, but never during

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his re-cross-examination repeated his question to the plaintiff, if he was willing to stand an examination by expert physicians. In fact, nothing further was said about the examination of plaintiff by expert physicians, until he was recalled by his counsel for further examination, and while he was being thus examined, counsel for defendant asked him this question:

"Now, Mr. Koonce, we will have plenty of time to examine you tonight; will you submit to be examined by competent physicians?"

MR. KINNEY: "Your Honor has already ruled on that.

THE COURT: "No, I have not if you are willing to it."

MR. MOORE (to plaintiff): "Are you willing to it?"

"A. No, sir."

"Q. You are not willing to it?"

"A. No, sir; you ought to have done that before."

"Q. You are not willing to it?"

"A. No, sir."

This closes what was said at this time, and plaintiff left the stand without being further questioned along this line. The next day, Dr. Whitelaw, who had been examined as an expert witness by the plaintiff, and dismissed, was recalled for further examination, and he stated that since he had given his evidence, he had examined the plaintiff the night before he last testified, when he caused him to remove his clothes from his ankles to his shoulders, and gave him a thorough examination, and put him on the operating table without any clothes on him, and found by actual measurement that the thigh corresponding to the one that he received the injury on, was about three-fourths of an inch smaller than its fellow—that is, the thigh on the

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opposite side. He then details fully what he discovered by this examination of the plaintiff, and said, "anybody could see that the affected side was decidedly larger, just from casual observation.' He said the injured side was about three-fourths of an inch smaller than the side not injured; that the right side, which was injured, was three-fourths of an inch smaller than the left side, which was uninjured, and that the injuries, in his opinion, would grow worse. Neither defendant's counsel, nor its expert witnesses, were present at this examination of the plaintiff by Dr. Whitelaw, and so far as the record shows, knew nothing about it. One of the questions for our determination is, whether the trial Judge committed error in not requiring the plaintiff to submit, at this stage of the proceedings, to a physical examination of that part of his body, and in fact of his whole body, claimed to have been injured in this collision, and one of the questions to be determined is, whether the Court refused it or not. The power of a Court, in which a suit for personal injuries is pending, to require a party to the suit, claiming to have been injured by the defendant, and for which injuries he has brought suit to recover damages, to submit to a physical examination of the injured parts, in order to determine whether or not he has sustained the injuries, and the extent of them, has been a much-mooted question in the Courts of the various States of the Union. Some of them, and, in fact, many Courts of great respectability and legal learning, have conceded the power of the trial Judge to order a suitor to submit to such physical examination by expert physicians, while other Courts of equal respectability and learning, and among them the Supreme Court of the United States, has denied such power to the *nisi prius* Courts. The question is novel in this State, and of first impression. We have

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no reported decisions directly in point. The question was incidentally touched upon in the case of *Lipes and Gamble v. The State*, 15 Lea, 126. In that case the trial Judge refused to allow some witnesses, who had examined the feet of one of the defendants, to testify as to their peculiarities, and in passing upon his ruling in this respect, Mr. Justice Freeman held that the trial Judge was in error in so holding, and in the course of his opinion, said: "Nor is there any reason seen why the fact might not have been investigated by competent men at any time, and their testimony given to the jury. As a matter of course, the State could rebut by having other parties examine the feet, as a physician, if deemed best, under orders of the Court, if any doubt as to the fact, or whether the witnesses had told the truth." While the question of the power of the Court to so order such an examination, was not before the Supreme Court at this time, yet, Mr. Justice Freeman seems to treat the right of the State to have the defendant's feet examined by a physician, under the orders of the Court, as a matter of course. Or in other words, the expression used by him seems to imply that there is no doubt of the power of the Court to make this order. But the question was not then before the Court, and what Mr. Justice Freeman said was mere dictum.

In the case of *Railroad Company v. Ayres*, 16 Lea, 726, which was a case to recover damages for a personal injury, it appeared that a physician had examined the plaintiff pending the litigation, and when his deposition was offered as evidence for the plaintiff, the defendant moved to exclude such parts of it as he testified, as an expert, to the physical infirmities of the plaintiff, and these exceptions were overruled by the trial Judge, and the physician's evidence read to the jury. The action of

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the trial Judge, on these exceptions, was assigned as error in the Appellate Court, and while examining these assignments Mr. Justice Cooper said: "The authorities cited in support of this objection are merely cases in which the Court, upon the application of one or both parties, has appointed experts to make an examination of the person injured with a view to ascertain the extent of the injuries. This is, no doubt, the best mode of obtaining the testimony of experts," thus giving his sanction, or judicial indorsement, to the method attempted to be adopted by the defendant's learned counsel during the trial of this cause. This, however, is the expression of an opinion by Mr. Justice Cooper upon a question not raised by the assignment, and is, therefore, dictum.

These statements, however, of these learned jurists, indicate the trend of the judicial minds of our Courts, and indicate a leaning toward the power of the trial Judge to order the party, claiming to be injured, to submit to a physical examination of the injured parts by expert, scientific physicians, to the end that his true condition may be made known to the Court.

In the case of the *Memphis Street Railway Company v. W. B. Saunders*, an appeal from the Circuit Court of Shelby County to this Court, and heard and determined by it at its January term, 1909, in an opinion delivered by the writer on the 27th of February, 1909, this same question was sought to be raised by the learned counsel of the Street Railway Company; but it was held in the opinion delivered, that there was no error committed in this regard by the trial Judge. It appears that the application in that case for a physical examination, was made after the plaintiff below had testified, and while there was no motion to that effect, learned counsel for the Railway Company suggested that the plaintiff go to the sheriff's

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room and be there examined by two reputable, expert, skilled physicians, in order to ascertain his physical condition, and whether or not it was due to the accident or injury received by him while a passenger on one of its cars. The Court never made any direct ruling upon the question, though it was insisted in this Court, that he had refused to allow the physical examination. It appeared that before the expert witnesses for defendant were examined as such, they examined fully the afflicted arms of plaintiff in open Court, and did not express a desire for further examination than plaintiff allowed them, and this Court held that there was no error in any action of the trial Judge had in this respect. The cause was taken by *certiorari* to the Supreme Court, and was ably argued in that Court, almost alone upon the one question as to the power of the trial Judge to direct an order that plaintiff Saunders submit to a physical examination by the expert physicians of the Railway Company, and Mr. Justice Beard, who delivered the opinion of the Court, held that, 'the action of the Court in declining the request of plaintiff in error, was prejudicial to it, and that for this, if no other error had been committed, the case must be reversed.' A petition to rehear on this particular point was filed by appellee's counsel, Mr. Riddick. This petition was continued until April term, 1910, of the Supreme Court, when the case was again argued before that body and decided by Mr. Justice Neil, in an opinion filed July 2, 1910. After adverting to the different views entertained by the different Courts in all the States of the Union, Mr. Justice Neil says, "We deem it unnecessary in view of the peculiar facts of the case, to align this Court on this controverted question, and, therefore, decline to do so." In another paragraph of the opinion, Mr. Justice Neil further said: "Once con-

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ceding that the trial Court has the right to require the plaintiff, in such a suit, when turned over to the cross-examiner, to submit his injured limb to the examination of the experts of the defendant, while on the witness stand in the presence of the jury, it is not going far to hold that this may be required on the order of the Court when seasonable application is made under proper safeguards outside of the Court room." And, finally, in closing, the learned Justice says: "We still think that the record is not in a condition to require that we shall rule upon this question, and we, therefore, leave it open for discussion and termination when it does properly arise. Upon a re-examination of this record, we have reached the conclusion that the motion for a physical examination of the plaintiff in this case, was not seasonably made. The case was on trial, the plaintiff was on the witness stand, and it was only when he had been turned over to the cross-examiner that the trial Judge was asked to require him to leave the Court room and submit to the examination of defendants experts," and because the application was not seasonably made, the Supreme Court, speaking through Mr. Justice Neil, finally decided that no error had been committed by the trial Judge, and entered a judgment affirming the decision of this Court. While the question was not determined in *Railway v. Saunders*, yet the holding, in the opinion of the Chief Justice, and the statements made by Mr. Justice Neil in his opinion, tend strongly to create the belief that if the question had been properly made in that case, the Supreme Court of Tennessee would have sustained the power of the Court below to make an order, requiring the plaintiff to submit to a physical examination of his alleged injuries, in order to determine the effect and the extent of such injuries. It thus appears that the question, attempted to be made

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in this case, is still an open one in Tennessee, and is, perhaps, not now raised by this record, for our determination. It seems, however, necessary to pass upon the question, in order to determine first, whether the Court had the power now insisted upon, and next, whether application was seasonably made for the exercise of that right.

As has been well said, the object of a judicial trial, is to enable the State to establish justice between party and party; to establish, if possible, exact justice between them, and if not exact justice, to approximate as near as possible, exact justice. Whoever shall become a party to an action in the Court, whether that person be the humblest citizen, or one of the idle rich; or whether it be a wealthy corporation, with almost unlimited capital, employing the greatest and most learned lawyers that money can command; or whether it be one of our smaller corporations, with limited financial ability and the country lawyer in its employ; that party has a right to demand and to have administered to it or him, exact justice if possible of attainment. Exact justice can only be secured or reached by having full and exact truth upon all matters in issue in the case. If less than the truth is had, an injury will be done someone; therefore, the right of a party to an action to demand the whole truth and nothing but the truth, upon every issue involved in the cause, cannot be doubted or questioned.

The purpose of this suit, as well as all other actions, is to do equal and exact justice between the plaintiff and the defendant, and in order to attain that end, the Court must know the exact truth of the facts involved in issue, and when a party to a suit disputes the right of his adversary to a knowledge of any fact pertinent to the truth of the issues, his denial raises a suspicion that his claim is unjust or unfounded. In this cause the defendant

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denied and insists the plaintiff was not injured by the collision, to the extent claimed by him in his testimony, or by his physicians in their evidence. If he was injured to that extent, he had nothing to fear from a physical examination by expert, scientific medical men; if he was not so injured, such an examination would expose the fallacy of his claim and show it without merit. The Court and jury had the right to know the truth of this matter, and the right to the very best evidence that would show the truth of this matter. If, as has been said, the plaintiff may expose his wounds or injuries to a friend or kinsman, or to his family physician, or even to an expert physician of his own selection, and have them testify as to what they saw or discovered by such an examination, there is no reason in law or morals, if he is unwilling, why the Court should not compel him to submit to an examination by expert, scientific and disinterested medical men, in order that the exact truth as to his physical condition, resultant from the injuries, may be shown to the jury. As we have said, if he is injured to the extent claimed by him and his friends, he has nothing to fear from such an examination, and if he is not so injured, he is attempting to practice a fraud on the Court, and such fraud should be exposed, and his false claim denied. We, therefore, think there are no grounds in law or reason, why an application seasonably made to the Court, to have a party examined who sues for physical injuries, in order to ascertain whether his claim is false or just, should not be sustained. The Supreme Court of the United States, in *Railroad Company v. Botsford*, in an opinion delivered by Mr. Justice Gray and reported in 141 U. S. R., 35 Law Ed., page 257, held, in a civil action for an injury to the person, the Court, on application of the defendant and in advance of the trial, has

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no legal right or power, to order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injuries sued for. This decision was rested upon the involability of the person, the Court seeing no difference between the compulsory stripping and exposing of a person, than a blow upon his body. Mr. Justice Gray said: "To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger without lawful authority, is an indignity, an assault and a trespass, and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a small number of cases based upon special reasons,' and for these reasons, and for the further reason that it was without the power of the Court to compel the compliance with such an order, the Supreme Court of the United States held that the trial Judge was without such authority. This opinion, however, is very much weakened by the views of Mr. Justice Brewer, in which Mr. Justice Brown concurred, expressed by him in his dissenting opinion, and among other things the learned Justice said: "The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature, the plaintiff may make in the Court room, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but

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by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the Court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases in the interests of justice, or from considerations of mercy, the Courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?"

It is difficult for any judicial mind to answer this profound argument of Mr. Justice Brewer, and, indeed, in the opinion of the writer, his masterly reasoning has never yet been refuted by any Court taking issue with him.

The case of *Railroad v. Botsford*, *supra*, has been followed by only three States in the Union. The Supreme Courts of Illinois and New York adhere to the rule laid down in the case of *Railroad v. Botsford*, but the Legislature of New York, recognizing the injustice of such a rule, passed an Act authorizing *nisi prius* Judges, upon application seasonably made by either party to a suit, to direct the personal physical examination of the injured one by a reputable, disinterested physician, and this statute has been upheld in a number of adjudged cases by the higher Court in the State of New York.

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The Supreme Court of Kansas, at its January term, 1883, in the case of *Railroad Company v. Thul*, reported in 44 Am. R., 659, held in an action of damages for permanent injury to the eyes, the plaintiff having testified and no medical expert having testified, the Court may order the plaintiff to submit to an examination by a competent, expert physician. In this case, the case of *Loyd v. Railroad Company*, 53 Missouri, 509, was cited as supporting the rule that the Court had no power to make or enforce such an order. Such was the holding, at one time, of the Supreme Court of Missouri, but that tribunal has since receded from that holding, and it is now the rule of practice in the lower Courts of that State, to order such investigations, and this procedure is sustained by the Supreme Court of Missouri.

The Supreme Court of Iowa, in a case reported in 47 Iowa, 375, and quoted from at length by the Supreme Court of Kansas, in *Railroad v. Thul*, *supra*, is in line with a large majority of the States, that the *nisi prius* Courts have the common law right to order that persons claiming to be injured, submit to an examination. In the opinion of the Supreme Court of Kansas, in the case cited, it is said: "The tendency of modern adjudications and of modern thought, is to open the door as wide as possible for the introduction of all evidence that may throw light upon the particular subject then undergoing investigation. All attainable evidence and instruments of evidence within certain limitations, may be presented to the jury for their inspection and consideration, and all proper modes of investigation or inspection, may be resorted to for the purpose of enabling the jury to arrive at just and correct conclusions. Many instruments of evidence, however, can be examined only by the aid of experts, and in such cases, the aid of experts is not only allowable, but

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may be demanded as a matter or right by the party needing such aid."

The Supreme Court of Wisconsin has aligned itself with the other States, holding that the party sued for inflicting an injury upon another, has the right to an examination of his antagonist by medical experts, and in the case of *White v. Railroad Company*, 61 Wis., 536, reported in 50 Am. R., 154, it was held in an action for personal injury, the Court may at the trial, compel the plaintiff to submit to a surgical examination. This was the case of a woman who brought suit for an injury to her limb, and notwithstanding the objections urged on the grounds of delicacy of examining a woman's limb, yet the Supreme Court of Wisconsin reversed the lower Court alone upon the ground that it had refused the motion of the defendant for an examination of the injured party, and held that the case under consideration was a proper one for the exercise of the discretion conferred upon the trial Judge in such matters.

The Supreme Court of Georgia, in a case reported in 3 L. R. A., 808, reversed the holding of the lower Court refusing an application, seasonably made, to have the plaintiff, a lad of thirteen years old, examined by medical experts, and in the course of the opinion the learned Chief Justice said: "As to the suggestion made in argument that the rule would operate hardly upon delicate and modest females, we can only say that they would be safely guarded by the discretion of the trial Judge. There would be no danger, we think, in this Court, of an examination being ordered needlessly, or where an improper shock to modesty or feelings of delicacy would be likely. We simply decide that the power exists, and that in every case it is to be exercised or not, according to the sound discretion of the trial Judge.

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In June, 1890, the Supreme Court of Alabama, in a case reported in 9 L. R. A., page 442, held in a case wherein the plaintiff was a young, modest, delicate girl of seventeen years old, that it was error in the trial Judge to refuse to make an order directing that she submit to a physical examination of the injured parts by competent medical experts, and because of this error, the case was reversed and remanded.

The Supreme Court of Michigan, in 1893, in an opinion reported in 19 L. R. A., held that the lower Court has the power to compel the exposure of an injured arm to a physician in the presence of the jury, in a trial of an action for such injury, and the case of *Railroad v. Childress*, 3 L. R. A., 808, *supra*, was quoted approvingly as an authority for the holding of the Supreme Court of Michigan.

The Supreme Court of Iowa, in an opinion reported in 34 L. R. A., 209, held that the measurement, in the presence of the jury, of a woman's foot and her leg, six inches above the ankle, in a suit for injury to the foot and ankle, should be permitted by the Court, when there is a direct conflict as to the measurement of this foot, by the medical men called by the respective parties, at least if she made no objection.

In *Hudleston v. Railroad Company*, the Supreme Court of Indiana, in an opinion reported in 36 L. R. A., 681, decided that the lower Court had the power to compel a plaintiff, who had testified that he was suffering from albumen and sugar in the urine as the result of an injury, on defendant's application, to produce a specimen of his urine in open Court, to be analyzed by proper experts and physicians, especially where he had testified that he had had such analysis made for his own counsel and by his own physicians. To the same effect is the holding of

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the Supreme Court of Washington, 46 L. R. A., 153, and also of the Supreme Court of Minnesota, 46 L. R. A., 448; but in *Wittenberg v. Onsgard*, 47 L. R. A., 141, the Supreme Court of Minnesota held that the refusal of the lower Court to compel the plaintiff to submit his neck to be photographed by the use of X-ray, in order to ascertain the nature of the injury, was not error, because such application had not been seasonably made, and also, because it did not sufficiently appear that the person who was to make the photograph, had the requisite skill and experience to do so. The Court said: "A party ought not to be required to submit his person to the X-ray until it is so well established as a fact, in science, that the process is harmless, that the Courts will take judicial notice of it." The Court, however, recognized and admitted the rule to be sound, that ordinarily, where the application was seasonably made for an examination by medical experts, it should be granted.

The Supreme Court of Massachusetts, in the case of *Stack v. Railroad Company*, and reported in 52 L. R. A., 328, denied the power of the trial Court to compel a plaintiff to submit to a physical examination by a physician, in the absence of statutory authority.

November following the opinion of the Supreme Court of the United States in the *Botsford case*, *supra*, in *Southbend v. Turner*, reported in 54 L. R. A., 396, the Supreme Court of Indiana again reiterated its holding that the party complaining of a personal injury for which he brings suit to recover damages, may be ordered to submit to a physical examination by a physician appointed by the Court, where the defendant has no other method of determining the extent of the injury, and the examination may be made without pain or danger to the plaintiff

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Some Courts have denied the application, but held such denial not an abuse of the discretion of the trial Judge, because such examination was not necessary; and in other cases, the application has been refused because not timely made; while the application has been denied by some Courts, because a previous examination had been made which disclosed all the facts necessary to the attainment of justice in the cause. It has been held in some jurisdictions that the plaintiff was justified in refusing to submit to an examination by certain physicians, upon the ground that the physician was hostile or obnoxious to him, but in no reported case, has such physician been appointed by any Court, to make the examination. The Courts have always refused to order an examination where it is necessary to use instruments or drugs, that are likely to cause pain or injury, but it is only in few jurisdictions that the Courts have denied the power of the *nisi prius* Judges to appoint a competent, disinterested expert, to make the examination, when the application is seasonably made and there exists a necessity therefor.

The latest expression of opinion upon this question to which we have had access is that of the Supreme Court of Colorado, reported in 15 L. R. A. (N. S.), page 663 *et sequi*. This is one of the ablest and most exhaustive opinions that has come under our observation, during our investigation of this question. It cites the opinions of the Supreme Courts of Missouri, Kansas, Iowa, Alabama, Arkansas, Georgia, Indiana, Kentucky, Michigan, Minnesota, Nebraska, Ohio, Pennsylvania, Washington, Wisconsin, and, in fact, many others, in support of the rule laid down by it. It is stated in this opinion that the only cases holding a different doctrine, is the solitary one decided by the Supreme Court of the United States, and which we have cited, and one in Illinois, reported in 40

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American Reports, 588; but we know, and have cited, the decisions of Massachusetts, following the Supreme Court of the United States, and if these be all, then there are no other Courts in accord with the opinion in the *Botsford case*. In the notes to this opinion, it appears that the Courts of nearly every State in the Union have had this question before them, and sustained the power of the trial Judge to order the examination insisted upon in this case.

The conclusion reached by the eminent Judge who delivered the opinion of the Supreme Court of Colorado, Mr. Justice Maxwell, is best stated in his own language, and we quote it, giving it our full approval, both as to the time to make application therefor, the person by whom it should be made, and when it should be made, and as to who has the right to be present when the examination is made. The language of Mr. Justice Maxwell on these points is as follows:

"The authorities above cited in support of the power, concur in the establishment of the following proposition: (1) That trial Courts have the power to order a medical examination, by experts, of the person of a plaintiff asking recovery for personal injury. (2) That a party has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial Court. (3) That the exercise of such discretion is reviewable by the Appellate Court, and corrected in case of abuse. (4) That examination should be applied for and made before entering upon the trial, and should be ordered and had under the discretion and control of the Court, whenever it fairly appears that the ends of justice require the disclosure, or more certain ascertainment of important facts, which can only be disclosed, ascertained and fully elucidated by such an exami-

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nation, and when the examination may be made without injury to the plaintiff's life, health or the infliction of serious pain. (5) That the refusal of the motion, where the circumstances appearing in the record present a reasonably clear case for the examination, under the rule stated, is such an abuse of the discretion lodged in the trial Court, as will result in a reversal of the judgment in plaintiff's favor. (6) That such order may be enforced, not by punishment as for contempt, but by staying or dismissing the action."

We would add, in cases of female plaintiffs, suing for an injury to their person, in no case should she be compelled to submit to such an examination unless in the presence of her family physician and near family relatives, and not then unless, in the opinion of the trial Judge, the ends of justice demands such an examination.

We are of the opinion that wherever the applicant brings himself within the rules laid down, *supra*, it would be the duty of the trial Judge to sustain a motion for such an examination, provided, however, that the party making the motion be taxed with costs incident to the examination, and provided always that it be conducted by a disinterested, competent, medical expert, in no way connected with the parties to the litigation, and had in the presence of the counsel of the party examined, and his or her family physician. In such cases we think it would be proper and right that an examination be made under the rules stated above.

The question now for our determination is, whether the defendant brought itself within these rules when its application was made, if it made such an application, for an examination of the plaintiff. It is insisted by learned counsel for defendant that plaintiff was feigning, or if not, that his condition at the time of the trial was not

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the effect of the injury received when the collision occurred. We are constrained to hold that in the first place, defendant really made no application to the Court to have an examination made by a physician; and, next, if he did make such an application or motion, the record fails to show that the Court acted upon it or denied his application. Even conceding that the motion was made in proper form during the trial of the cause, it was not seasonably made, but should have been presented to the Court before the trial of the case was taken up, and not having been so made, the trial Judge did not abuse his discretion in refusing to sustain the motion.

For these and other reasons that might be stated, we are of the opinion that under the circumstances, and at the time the application was made, the defendant was not entitled to have it sustained, and for that reason no error was committed by the trial Judge in this matter. For the foregoing, and other reasons not herein stated, there is no error in the judgment of the lower Court, and it is affirmed with costs.

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BOARD OF TRUSTEES OF THIRD PRESBYTERIAN CHURCH V.
JAS. L. CALDWELL.

Writ of certiorari denied by the Supreme Court.
(*Knoxville*. September Term, 1913.)

1. RELIGIOUS SOCIETIES. *Subscription for church building. Consideration. Enforceability.*

A member of a religious society who starts a movement to erect a church edifice and who heads a subscription list with a large amount to be used for that purpose and who circulates or acquiesces in the circulation of such list for the purpose of raising a large sum of money, may be compelled by suit to pay this subscription when the congregation upon the strength of this and other subscriptions has contracted for the erection of a building and has proceeded therewith.

2. SAME. *Estoppel and waiver.*

Such subscriber cannot avoid liability upon the ground that there was a change in the location of the building or in the personnel of the congregation if after making his subscription he became aware of these changes and continued to co-operate with the congregation and took no steps to withdraw his subscription.

3. SUBSCRIPTIONS ON CONDITION.

Subscriptions upon conditions not written upon the list or not communicated to the other subscribers are collectible notwithstanding, if the congregation has upon the faith of the written subscription expended large sums for materials and incurred other expenses.

FROM HAMILTON COUNTY.

Appealed from the Chancery Court of Hamilton County.
T. M. McCONNELL, Chancellor.

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THOMAS & THOMAS and CHAS. S. COFFEY for Complainant.

JAMES T. CALDWELL for Defendant.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

COMPLAINANT, a chartered religious institution of Chattanooga, instituted this suit against the defendant to recover the sum of \$800.00 which it claimed to be due as the balance of a subscription of \$1,000 toward the purchase of a lot and the erection of a building thereon. The pertinent averments of the bill are in substance that in the early part of the year 1909 the congregation, which afterward took the name under which complainant now exists, determined to purchase a lot and erect a church building; that to and for this purpose complainant agreed to contribute, among numerous other subscribers, the sum of \$1,000; that pursuant to this agreement and subscription and contributions from other sources the trustees of the church purchased a lot and began the erection of a church edifice, and have completed the same; that defendant had paid \$200.00 upon his \$1,000 subscription, but had refused to pay the remainder; that defendant was the chief actor and promoter of the church enterprise, and carried about a subscription list and solicited subscriptions, and also that his name appeared at the top of the list, and was the means of inducing quite a number of others to subscribe; that complainant on the faith of this and other subscriptions had had a great deal of work done, and had expended large sums and incurred large indebtedness. Complainant prayed for recovery.

In his answer defendant admitted having subscribed or agreeing to subscribe \$1,000 for the erection of the church,

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but insisted upon non-liability upon two chief grounds, namely, that his subscription was on the condition that the congregation stick together, and that the proposed church be erected close in on McCallie Avenue, one of the principal thoroughfares of the city; and also that his subscription was not a legal obligation.

The response of complainant to these contentions is that in the first place no such conditions were annexed to the subscription, and, secondly, that if they were so stipulated, they were waived by the defendant, and he is estopped to rely upon the same. The record is quite voluminous, and the controversy bears much evidence of acrimony. It is unfortunate that the matter is before the Court for determination. But it becomes our duty to pass upon the questions raised without reference to their ecclesiastical aspects. It is well settled that the civil courts can enforce contracts and agreements made among the members of churches with respect to the erection and maintenance of church buildings, and in passing upon these questions they apply in the main to the rules of law governing other contracts and subscriptions.

It seems to us that the matters of dispute, narrowed as they have been by the briefs and arguments of able counsel for both sides, can be best treated by stating beforehand the matters about which there can be no controversy, and then passing to those differences arising upon defendant's principal defenses.

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We shall take up the defenses now urged, or rather the matters of dispute, and settle them in accordance with our views as to the preponderance of the evidence.

1. With respect to defendant's contention that his subscription was conditional up on the church sticking together and erecting a building on McCallie Avenue, we feel

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constrained to hold that the preponderance of the evidence shows that his subscription was without any such conditions. The burden is upon him to show these conditions. In this we think he has clearly failed.

It is our conclusion that he annexed no such conditions to his oral promise and declaration made to the congregational meeting of May 30th. As before stated, the oral subscriptions pledged at this meeting were jotted down. These were afterward transcribed by a stenographer and several copies or duplicates made. Preceding the names and amounts was an unconditional promise upon the part of each of the undersigned to contribute the amounts opposite their names for the purpose of buying a lot and building a church. The first name on this or these subscription lists was that of defendant, and opposite his name was \$1,000.00. We reiterate that no condition was annexed to these subscriptions.

It is true that defendant did not himself sign his name to the list, but he was aware that his name had been so written by someone, and that it headed the list. He took one of these subscription lists and went with the pastor to different people and solicited subscriptions and procured quite a number. He also knew that other copies were being used by other solicitors, and that his subscription appeared thereon, and would be quite an inducement to the obtaining of additional amounts. Defendant did not inform anybody from whom he obtained subscriptions that his promise was conditional.

2. Granting that his subscription was made upon condition that the church building be erected on McCallie Avenue, we are convinced that he unmistakably waived this condition, and that he is estopped to rely upon it now.

3. With respect to his contention that his subscription was also conditional upon the congregation sticking to-

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gether, we have this to say: We are impressed with the force of the insistence of learned counsel for complainant that this condition is too general and too indefinite and too unreasonable to be upheld. It might be added that with respect to such congregations it is an impossible condition, or it is evident to observant persons that no church congregation remains the same *personnel* for any appreciable length of time. The best solution of the controversy urged by defendant under this head is found in the testimony of G. M. Smartt, and in the surrounding circumstances. This witness states that Mr. Caldwell knew at the time he made his talk to the congregation on May 30th that they would not all stick together, and that this was clearly understood by him. Mr. Smartt further said that he stated to the meeting that if an effort was made to build a church he was going to withdraw, and that others made the same statement. It is clear that the defendant was aware of these declarations; and we are unable to see how he can urge that his subscription was on the condition of adherence and coherence of the congregation when there was disaffection known to him at the very time.

With respect to the "stick together resolution" we must say that it did not have specific reference to the building of a church, but that its real purpose was to secure a declaration of adherence to the congregation so as to prevent dissodution. But be that as it may, we find that at an early date thereafter some of the subscribers ceased to coöperate with the congregation, and that this was known to the defendant.

We reiterate that defendant was aware of the departure of some members and non-affiliation of others, and yet that he treated his subscription as subsisting and continued to recognize the congregation as in existence. He lost his time in which to raise his objections.

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Conditional subscriptions to public or corporate enterprises are not favored. Conditions unknown to other subscribers should never be recognized. The sounder rule governing subscriptions to the stock of corporations is that secret agreements or conditions are void as against other subscribers and creditors of the corporation: *Cuttingham v. R. B. Company*, 2 Head, 22; 10 Cyc, 413, 414. Courts of equity should borrow this rule in meeting the contention of a subscriber to a public, religious or charitable enterprise. Upon legal, equitable and moral principles his defense should be discountenanced. It would be a fraud upon the numerous other subscribers and members of the congregation who have contributed and coöperated and carried to fruition the purpose to erect a church, to relieve defendant of his promise to pay. It is for this reason that the inclination of all the Courts is to allow recovery by the trustees of the donee or payee: 102 Am. St. Rep., 145; 29 Pa. St., 361; 37 Cyc., 486. The germ of this liability had its origin among the Romans. The civil law term used to express it was *pollicitatio*, which translated means a vow or an offer to give something to the public. This offer became irrevocable if accepted or acted upon by a substantial number of the class or community to whom it was addressed.

It clearly appears that the subscription of the defendant to some degree influenced nearly every subsequent subscriber. It is also evident that the subscribers and the trustees in their endeavors to erect the church building and their engaging of workers and materials relied upon defendant's subscription, and proceeded on the assumption that it would be paid. It would be inequitable and in a manner fraudulent to permit plaintiff to escape liability. There are presented the clearest features of estoppel, and there should be applied to defendant this efficacious doctrine: *Reiman Snyder v. Ganns*, 110 Pa. St., 17; 37 Cyc., 492; *Martin v. Meles*, 179 Mass., 114.

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Much was said in the argument of learned counsel for defendant about the failure of the congregation to demand other subscriptions. The preponderance of proof is that all subscribers, with the exception of five or six, have paid up or have arranged to pay, and that of those who have not settled there were good reasons for not demanding payment. But there is no effort to show that those who did subscribe and have not been released upon moral or equitable grounds are not going to be sued or called upon to pay. The failure, however, to collect from all would furnish no just excuse to the defendant for failing to pay up, especially as he was the real leader and promoter of the church building enterprise. It strikes us that he should have been the first one to respond, in view of the leading part taken by him in the matter, and in view of his knowledge of the methods used to obtain other subscriptions were obtained: *Rogers v. Female College*, 39 L. R. A., 636.

It was insisted by learned counsel that no probative force should be accorded the minutes of the later meetings of the church for the reason that they were not approved by a moderator. This criticism does not apply to those entries, which clearly show that the defendant was present and participated in the meetings of the church session.

That subscriptions of this kind are collectible, and that they should be enforced, has been settled by our own Courts. *Macon v. Shepard*, 2 Hump., 335; *Mt. Carmel Church v. Kinney*, 9 Lea, 215. It is also clear that a subscription made to a congregation in the formative stage may be collected by a corporation subsequently formed for the benefit of the corporation. *Carr v. Bartlett*, 72 Me., 120.

Upon consideration of the whole case, we have reached the conclusion that the learned Chancellor was in error in

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declining a recovery. His decree is reversed, with directions to enter a decree here for \$800.00 with interest from date of the filing of the bill. Defendant will pay all costs.

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BON AIR COAL & IRON COMPANY V. LEWISBURG & NORTH-
ERN R. R. Co.

Writ of certiorari denied by Supreme Court.

(*Nashville*, December Term, 1913.)

1. RAILROAD CONSTRUCTION. *Furnishers' Lien. Coal used in construction.*

A coal company which furnishes coal to a sub-contractor engaged in railroad construction, the coal to be used in generating steam with which the machinery of the sub-contractor is operated, has no lien upon the railroad right of way under Section 3580 of Shannon's Code.

2. SAME.

In order to assert a lien under said statute it is incumbent upon the furnisher to show that his materials were used in the construction of the road. Under the construction of the lien statute obtaining in this State a party who furnishes coal for steaming purposes to a sub-contractor does not bring himself within the class of those entitled to the lien.

FROM MARSHALL COUNTY.

Appealed from the Chancery Court of Marshall County.
W. S. BEARDEN, Chancellor.

Bon Air Coal & Iron Co. v. Railroad.

R. E. HAYNES and SMITHSON & ARMSTRONG for Complainant.

ROBERT ARMSTRONG for Defendant.

MR. JUSTICE WILSON delivered the opinion of the Court.

THE bill in this case was filed by the receivers of the Bon Air Coal & Iron Company against the Lewisburg & Northern R. R. Co. and J. A. Lloyd, trustee in bankruptcy for the Leighton-Ambrose Construction Co., to recover the amount due the said Coal & Iron Co. for coal sold and furnished said construction company, and to have same decreed a lien on the franchises, property, etc., of the railroad company to secure payment of its account. The bill, after stating that the Bon Air Coal & Iron Co. is a body politic under the laws of this State, and that its affairs were at the time of the matters herein complained of being carried on under the orders of the Chancery Court of Davidson County, Tenn., and that under the orders of said Court, complainants were appointed receivers of said Coal & Iron Co., and entered upon the discharge of their duties as such with authority to conduct its business, avers, in brief, that the Lewisburg & Northern Railroad Co. was engaged in building a line of railway from a point near Portland, Tenn., to a point at or near the southern boundary of the State, passing through Marshall County, and that said railroad company entered into a contract with the Leighton-Ambrose Construction Co. for the construction of about nine miles of its railroad in Marshall County, beginning at Lewisburg and extending southward along the right of way on said road.

2. That the Leighton-Ambrose Construction Co. undertook the construction of said line of railroad, and had been engaged in said construction work for several months when

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an involuntary petition in bankruptcy was filed against it by its creditors, and it was adjudged a bankrupt; that respondent, J. A. Lloyd, was duly appointed trustee for said Leighton-Ambrose Construction Co. by the bankrupt Court at Nashville to take charge of its assets and wind up its business, and that Lloyd was duly qualified as such trustee, and entered upon the discharge of his duties as such; that an order had been entered in the Court of bankruptcy at Nashville in the matter of Leighton-Ambrose Company, permitting complainants to file this bill in the Chancery Court at Lewisburg making the trustee in bankruptcy a party defendant, and they exhibit as a part of the bill the order of said bankrupt Court; that during the months of January, February, March, April, and May complainant sold and delivered to the Leighton-Ambrose Construction Co., at their special insistence and request, twenty-one cars of coal for \$698.94, and that this sum is justly due complainants, and is wholly unpaid.

They state that an itemized statement of the account is filed, marked Exhibit 3, and made a part of the bill, but not to be copied.

It is alleged that complainants furnished and sold to the Leighton-Ambrose Construction Co. for use in the construction and building of the line of railroad of respondent, The Lewisburg & Northern Railway Company, in Marshall County, Tennessee, and that it was used and wholly consumed by the Leighton-Ambrose Company as fuel for its engine hauling cars over the right of way of the Lewisburg & Northern Railway Company for the construction necessary in the building of said railroad and in its boilers supplying steam for the pumping of water used in said construction work, and for steam drills used in drilling into the rock for the purpose of blasting out and removing rock

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and earth and reducing said right of way to the proper level. It is averred that the cars used as above mentioned were a necessary part of the construction work, and were used in hauling dirt and rock along the right of way of the railway company in making cuts and fills and in drilling said right of way to the proper level.

They aver that the coal furnished by complainants was a necessary part of the said construction work, and went into and was consumed in the building of said line of railway, and the benefit of the same was received by the Lewisburg & Northern Railroad Company.

It is averred that May 12, 1913, they served upon said railroad company a notice that they claimed a lien upon said railroad, its property, franchises, etc., for the payment of the coal above mentioned sold to the Leighton-Ambrose Construction Co., and they filed said notice as an exhibit to the bill.

They allege that the estate of Leighton-Ambrose Co. will pay little, if anything, to its creditors, and that they have a lien upon said railroad, its property and franchises for the payment of the above-mentioned indebtedness, and they insist that they have a right to come into the Court and ask an enforcement of their lien, and that their rights in the premises be adjusted.

The prayer of the bill has been sufficiently indicated. We should have stated that the prayer of the bill is for a proper decree that a lien be declared upon the Lewisburg & Northern Railway Co., its property and franchises, for the payment of complainant's indebtedness, and that complainants be granted a decree against the Lewisburg & Northern Railroad Co. for the amount due complainant, and if necessary, that an attachment issue for the proper enforcement of their lien, and also for general relief.

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The bill alleges the furnishing of different quantities at different times of coal to the Leighton-Ambrose Construction Co. All the several parcels of coal furnished said construction company amount in value, according to the bill, to \$698.94.

After demurrer was filed to the bill, it appears that complainant was permitted to amend the same by adding: "Complainant alleges that the railroad company is authorized and empowered to take a bond from the construction company to indemnify it in case it should be required to pay for work and labor done and material furnished by complainant."

It is averred that the railroad company under its contract with the Leighton-Ambrose Construction Co. had the right to and did retain for its protection a certain percentage of the estimates made of the work done by said construction company to further guarantee to the said railroad company the faithful performance of the above contract, and that said amount so retained amounted to several thousand dollars.

The railroad company was required to answer, showing the amount that it received from the bonding company, and the amount of the retained percentage which was never paid over to the Leighton-Ambrose Construction Co. at the date of the last payment thereof, and what amount, if any, was paid on account of said retained percentage, and that such amount of retained percentage remaining in the hands of the railroad company and the amount received by it from the bonding company be declared a trust fund for the payment of complainant's indebtedness, and that complainant have judgment against the railroad company for the payment of its just indebtedness.

The Lewisburg & Northern Railroad Co. demurred to the bill because on its face it shows that the coal furnished

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by complainant, and for which a lien is claimed against it, was furnished to and given to a contractor, and that said coal was used by the contractor as fuel for its engine boilers, etc., said engines and boilers being a part of the equipment of the contractor, demurrant, under the Act of 1891, not being liable for such supplies or material; and, second, because the bill, on its face, shows that the coal did not enter into and become a part of demurrant's road within the purview of the railroad lien acts of Tennessee, the use of said material being too remotely connected with the building and construction of demurrant's line of railroad.

The case was heard upon the bill and demurrer thereto by Chancellor Bearden, August 14, 1913. He sustained the demurrer and dismissed the bill, His Honor being of the opinion that the coal furnished and used as alleged in the bill was not a charge upon the property of the railroad company, the same not having entered into and become a part of the construction of the railroad within the purview of the Act of 1891.

Complainant excepted to this decree of the Court, and prayed and was granted an appeal to this Court. The assignment of error is that the Chancellor erred in sustaining the demurrer to the bill.

The sole question in this case is, "Does a coal company that sells coal to a contractor or sub-contractor which he uses in generating steam to operate his drills or machines in grading a section of the roadway of a railroad, have a lien upon the railroad, its franchises and property, for the value of the coal, the sub-contractor having become insolvent?" The decision of the question depends upon the proper construction of Section 1, Chapter 98, Act of 1891, carried into Section 3580 of Shannon's Revisal of our Statutes.

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Said section is:

"Every sub-contractor, laborer, materialman, or other person, who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction of repairs of its culverts and bridges or furnishes cross ties or masonry or bridge timbers, for the same, which is used in the building and construction of such railroad, its bridges and culverts, or who lays, or aids in the laying of its tracks, building of its bridges, the erection of its depots, platforms, wood or water stations, section houses, machine shops, or other buildings, or for the delivery of material for any of these purposes, or for any engineering or superintendence, or who performs any valuable service, manual or professional, by which any such railroad company receives a benefit, all and every such person, or persons, shall have a lien on said railroad, its franchises and property, for the value of such work and labor done, or material furnished, or services rendered, as hereinbefore set out and specified in as full and ample a manner as is provided by law for persons contracting directly with such railroad company for any such work and labor done or for materials furnished."

In *Thompson v. Baxter*, 93 Tenn. (8 Pick.), 305, Hon. A. D. Bright, Special Judge, speaking for the Supreme Court, in reference to the right of a supervising architect, who had drawn plans, specifications, etc., for buildings erected upon lots, to a lien upon the lots for his services, said:

"The mechanic's lien is favored by the Legislature, and should not be hazarded by niceties in its enforcement," citing: *Bass v. Graves*, 4 Lea, 557.

However, the law is strict in its requirements that the claimant shall make it clearly to appear that he has a

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lien; but when that appears, the remedial laws for its enforcement are to be liberally construed; citing: *Kay v. Smith*, 10 Heis., 43; *Luter v. Cobb*, 1 Cold., 528; *McLoed v. Cahill*, 7 Bax., 199; *Dunn v. McKee*, 5 Sneed, 658.

Continuing, Judge Bright said:

"This lien is purely statutory and unknown to common law. Only those enumerated and embraced in the statute are entitled to the lien. A liberal construction of the mechanic's lien law does not mean that they shall be liberally construed in embracing or including others than those enumerated in the statute. It must clearly appear that the claimant has a lien. No one is entitled to the lien unless the statute includes him or them. They are not to be included by strained construction."

The Court held that the supervising architect was not entitled to the lien. Judge Lurton, then Chief Justice of the Supreme Court, dissented:

The rule announced in the case and the cases cited by Judge Bright is as we understand them, that a strict construction of lien laws, unknown to the common law and having existence alone by virtue of statutes, is applied in determining the parties coming within their terms and entitled to their benefits; but having shown that they come under the statute, a liberal construction will be indulged for the purpose of protecting and enforcing their liens.

Nans v. Park Co., 103 Tenn., 299, was a case in which a firm of florists of Louisville had a written contract with the Park Company to furnish and plant flowers and shrubbery, to build a rustic bridge, and grade the walks and ways about the hotel premises of the Park Company. The firm was to be paid \$3,000.00.

It carried out its contract. The Park Company became insolvent. The Louisville firm insisted that it had a lien on the buildings and ground of the company, under section

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3580 of Shannon Rev. Justice Wilkes, speaking for the Court, after quoting the section of Shannon's Revisal, said:

"It has been held in a number of cases in this as well as in other States, that a liberal construction should be given to mechanics' lien laws." He cites a number of cases. But it is clear from a reading of the opinion of the learned Justice that what he meant in saying that "a liberal construction should be given mechanics' lien laws," was, that they should be liberally construed as to the inclusion of property and subjecting it to the lien, but strictly construed as to parties seeking to come under the lien statutes, and claiming their benefits.

He reversed the decree of the Chancellor and the decree of the Court of Chancery Appeals allowing the lien claimed by the Louisville firm.

The opinion in *Hercules Powder Co., et al., v. Knoxville, LaFollette & Jellico Railroad Company* was also delivered by Mr. Justice Wilkes.

"A firm of contractors had a contract with the railroad company to build its road, excavate a tunnel, and furnish all the necessary material for that purpose. The original contractors sub-let the excavating and boring of the tunnel to Cole & Co., who, in turn, agreed to do all the work and furnish all necessary material and labor for that purpose.

Cole & Co. made contracts with the powder company and a chemical company to buy from them all the explosives and explosive supplies required in the excavation and boring of the tunnel.

These companies furnished Cole & Co. powder and explosive materials. Cole & Co. became insolvent and notified the railroad company that they could not complete their contract with it. They owed the powder company and the chemical company, each, a balance for

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supplies furnished, and they notified the railroad company that they claimed a lien upon its road, etc., to secure the payment of the balance due them. The railroad resisted the claim, contending that they had no lien on its road under the Act of 1891; herein quoted. The Chancellor held that they had no lien under said Act. The majority of the Court of Chancery Appeals held that the powder company did. The Supreme Court, through Justice Wilkes, affirmed the holding of the Court of Chancery Appeals.

The railroad company in its assignments of error raised the question, whether the explosive supplies furnished constituted material within the meaning of our statutes, Acts of 1883 and 1891, giving furnishers of material liens on railroads.

Judge Wilkes, after quoting the first section of the Acts of 1883 and 1891, said the latter Act was passed for the express purpose of extending to all sub-contractors and furnishers of material, the same lien that was guaranteed by the Acts of 1883 to persons contracting directly with the railroad company.

The railroad company insisted that the term "materials" as used in these Acts meant something that entered into the construction of the roadway and formed part of it, and did not apply to material consumed in constructing the roadway, because, being consumed, it constituted no part of the roadbed or roadway after it was constructed.

"We are of opinion," said Justice Wilkes, "that the General Assembly intended to give persons who furnished materials for grading the roadbed a lien, as well as those who furnished such materials as was in the superstructure placed upon the roadbed after it was graded, such as cross ties, culverts, etc. The fact that the materials were consumed in the use and were thus destroyed in the construc-

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tion, we think, does not deprive the furnisher of his lien. The consumption of explosives is the only use that can be made of them, and their consumption is absolutely necessary to the excavation of tunnels through rock. In other words, they are materials which enter into the building and grading of the road, as much so as trestles, bridges and culverts contain materials which are necessary to the grading of the road at such places as require trestles and bridges and culverts. It is difficult to see what other materials than explosives could be used in boring a tunnel and grading a road through stone. While the general definition of the word 'materials,' as given by the lexicographers, may not go to this extent, and there are some cases holding apparently a different doctrine, we think the word must be defined in the connection and for the purposes for which it is used and intended to be applied."

In *Knapp v. R. R.*, 6 Mo. App., 210, the Court said, by Justice Wilkes:

"The theory of statutory laws on this class of railroads is that the labor or material man is entitled to a certain beneficial interest or security in the structure whose value is increased by his labor and materials actually incorporated therewith."

The learned Justice, referring to the later case of *Chemical Co. v. R. R.*, 59 Mo. App., 6, uses this language of that decision construing a Missouri statute somewhat similar to ours:

"The rule to be deduced from the foregoing authorities is, that, in order to maintain a lien for materials furnished, it is not necessary in all cases that such materials should actually have gone into the structure and formed a part thereof. It is sufficient if their use was necessary, and they were in fact used or consumed in the making of the improvement. Hence, we think that the argu-

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ment is unsound, that the lien in the cases here must fail because the powder was entirely consumed, and, therefore, could not have been actually incorporated in the work. Such a construction of the statute we conceive to be a strained one and not within its equity or spirit."

Judge Wilkes cites a number of cases from other States construing statutes somewhat similar to ours.

He quotes the following from Mr. Elliot's work on Railroads, under the heading of what lien may be obtained, and lays down the rule as follows:

The nature of the claim for which a lien may be acquired depends, of course, upon the governing statute in each particular case. It is generally required that the labor should be performed or the material used in the construction of the road. Under such a statute, it has been held that giant powder furnished to be used, and used, by the contractor in constructing the road is material, for the value of which a lien may be acquired; but a lien cannot be obtained for machinery furnished to a contractor to be used in doing the work upon a bridge under a statute authorizing a lien for all materials used in and about the construction of the bridge. So, of course, grocers who furnish food for the workmen, while, in a sense used in the construction of the road, are not materials which so enter into its construction that a lien can be based upon them." Elliott on Railroads, page 1597, section 1068.

In the subsequent cases of *Luttrell & Co. v. Knoxville, LaFollett & Jellico R. R. Co., et als.*, 116 Tenn., 492, before our Supreme Court, Special Judge Henderson delivered the opinion. In that case a bill was filed in the Chancery Court by complainants against the railroad company named and the Louisville & Nashville Railroad Co., and Mason & Hodges Co., averring that complainants fur-

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nished materials, supplies, etc., to G. H. Cole & Co. of the value of over ten thousand dollars, which were used in the building and constructing a tunnel on defendant's railroad, Cole & Co. being sub-contractors under Mason & Hodge, and they prayed that their account be declared a lien on the property of the railroads under Chapter 98 of the Acts of 1891.

The Chancellor decreed that complainants had a lien for a portion of the account and refused to give them a lien for the balance, and dismissed the bill as to Mason & Hodge Co.

Complainants appealed from the portion of the decree that disallowed the lien as to part of their claim, and the two railroad companies appealed from the part of the decree adverse to them. Both parties assigned errors. The railroad companies insisted that the Chancellor erred in decreeing that complainants had a lien on their property under the suit for any part of the alleged account against Cole & Co., their insistence being that there is no privity of contracts between complainants and either of the defendants, and as Cole & Co. were not sued, and as the property of these appellants was not brought into the custody of the Court by attachment, the Chancery Court required no jurisdiction either of the person against whom complainants would be entitled to a judgment, or of the property which they seek to have subjected to the payment of their alleged claim against Cole & Co., and, therefore, that the decree of the Chancellor in the case was absolutely void.

Special Judge Henderson said: "That the suit was upon an open and unliquidated account for materials, etc., furnished Cole & Co., the sub-contractors, and which were used in the construction of the railroad, and the argument was that it was necessarily a proceeding to

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recover judgment in *personam* against the sub-contractors and a proceeding in *rem* against the property in which the sub-contractor had no interest.

After stating that the Act of 1891 amended Chapter 220 of the Acts of 1883, and quoting a part of the amending Act, and after referring to other matters and citing quite a number of authorities, and dealing with the necessity of parties and notice as a basis of enforcing the lien, and after referring to a report of the Master as to the material furnished, and dealing with other aspects and materials furnished, and referring to the fact that the Court had held that dynamite and powder furnished the contractor were liens, His Honor, the learned Special Judge, said:

"The contention is that complainants are entitled to a lien for the articles referred to, because, from the character of the work of construction and the length of time required, they were necessarily consumed or destroyed in the use of the same within a few hours or days, while some would last for months and all were indispensable to the work.

The same principle can be as properly applied with regard to horses and mules that may be employed in hauling, which, on account of the hard hauls, draughts, and long continued work are broken down and rendered useless, and thus the furnisher would have a lien on the railroad company for the whole outfit of the sub-contractor in addition to all the materials which were furnished them or went into the construction. This would be a construction of the Act, which extends far beyond the intention of the Legislature. The test is not whether the article furnished was consumed in its use, either immediately, as in the case of explosives, or by degrees from long and hard use. If a lien is allowed for tools and machinery

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and horses and mules on complete destruction, on the same principle it should be allowed for deterioration in value *pro tanto* when not completely destroyed."

He quotes the following from Elliott on Railroads:

"All of the decisions upon this subject draw a clear distinction between the explosives and explosive supplies used in the construction of a railroad company's right of way, and which are necessarily consumed in the use thereof, and machinery and tools furnished for that purpose, which are held to be a part of the contractor's plant, and which do not go into the building of the roadway, but retained their identity and fitness for future use, saving the limited and gradual wear and tear incident to such use. The explosives which are necessarily consumed in the use are held to be lienable while the tools and equipment which constitute the contractor's plant do not constitute liens under the several lien statutes."

The result of the holding of the Court was that none of the material included in the account of complainants in the case and made an exhibit to the bill were lienable materials, excepting the items for "dynamite fuse, blasting wire, and wire fuse, and the items for nails, nuts, washers, bolts, soft steel and iron which went into the construction of the lining and approaches to the tunnel."

In other words, it was held in the case above, *Luttrell v. Railroad*, that the rule of construction given to the mechanic's lien law to carry out its purpose and to secure and protect parties entitled to the liens for the purpose of promoting and encouraging improvements is applied to the railroad lien law. The material man has a lien on a railroad for explosives furnished a sub-contractor to be used in blasting rock in a tunnel of the railroad under the Act of 1891, Chapter 98, Section 1.

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He is not entitled to a lien for materials furnished to a railroad contractor or sub-contractor for the erection of shanties on leased land adjacent to the railroad right of way for shelter of his workmen.

He is not entitled to a lien against a railroad for furnishing to a sub-contractor gasoline, gasoline torches and coal oil used for lighting a railroad tunnel while in process of construction, nor for packing, mattocks, cotton waste, electric light supplies, carts, tools, shovels, spades, blacksmith tools, wagons, scrapers, plows, machines, machinery derricks, derrick crabs, cables and repairs for all the articles, as they are not lienable articles.

What precedes, shows, as we think, the state of the law applicable to the subject in hand in this State, so far as definitely announced by our Supreme Court.

We think these propositions may be stated as clearly established by the decisions referred to.

1. The liberal rule of construction applied to the mechanic's lien law to carry out the intention of the Legislature in enacting it will be applied to what may be called the railroad lien law.

2. Liberality of construction, as applied to these lien laws, is not indulged for the purpose of including parties entitled to their benefits who do not clearly come within their purview and intent, but is indulged for the benefit of parties who come within their protection, for the purpose of embracing property subject to the lien.

3. Materials furnished a contractor or sub-contractor in railroad construction, in order to be lienable, must be materials used in direct contact with the removal of the rock or dirt in grading or constructing the roadbed or some physical part of the railroad, or as an immediate, direct, and necessary casual connection with and constituting a power that removes the rocky material, etc., opening and grading the roadbed of the railroad.

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In other words, if we may so state the proposition, where a tool, machine, or agency belonging to the equipment of the contractor or sub-contractor, directly does the work of removal and grading, materials furnished which are used simply to aid in operating the tool, machine, or agency, are not lienable material under our statute.

In the case of giant powder or explosives put in holes bored in the rock of a tunnel, the powder or explosives, when touched off or ignited, themselves do the work of removal or dislodgment of the rock. The coal in an engine does not. The distinction may appear, on the surface, as thin or shadowy, yet we think it has substance, and, at any rate, it is, we think, sustained by our decisions.

It results that the decree of the Chancellor will be affirmed with costs.

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MRS. P. K. FERGUSON, BY NEXT FRIEND, J. H. FERGUSON, v. P. M. ANDERSON, ET AL.,

AND

DUNLAP MILLING CO. v. MRS. P. K. FERGUSON.

Writ of certiorari denied by the Supreme Court.

(Nashville. December Term, 1913.)

1. LANDLORD AND TENANT. *When relation exists between owner of lands and one under contract to purchase.*

One in possession of lands under a verbal contract to purchase, but with the condition that he may at his option, before making payment, become tenant and pay rents, and who, during such occupancy, elects to become tenant rather than purchaser, is, as to a third party dealing with the occupant and chargeable with notice of the contract or relations between the proposed purchaser and seller, a tenant from the time the contract was entered into.

2. SAME. *Same. Lien of landlord for rents.*

The landlord in the case just stated has a lien on the crops of the tenant superior to a mortgage taken by such third party.

3. MARRIED WOMEN. *Separate estates of.*

Where a husband conveys lands to his wife and minor children and subsequently the children, on reaching their majority, convey their interests thus acquired from their father to their mother, all the conveyances being for love and affection, the wife and mother acquires a separate estate in all the lands.

4. SAME. *Rights of husband to rents and profits of his wife's general estate. Shannon's Code, section 4237, construed.*

At common law the husband was entitled to the usufruct, rents and profits of his wife's lands held as her separate estate during the existence of the marriage relation, and this right of the husband is not changed by the provision of Shannon's

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Code, section 4237, providing that such rents and profits shall not be subject to the debts or contracts of her husband except by her consent obtained in writing, as that statute goes only to the extent of protecting the rents and profits of the wife's property from the husband's creditors, and does not interfere with the husband's rights.

5. *SAME. Rights of husband to rents and profits of his wife's separate estate.*

While the rents, income and profits of the wife's separate estate are her separate property, she may so deal with them as that they will lose that character. So if the wife, acting without any undue influence, expressly authorizes or tacitly permits her husband to receive the income of her separate property and apply it to his own uses and purposes, or to receive it and apply it for the benefit of the family, it will thereby cease to be her property and become his.

FROM MONTGOMERY COUNTY.

Appealed from the Chancery Court of Montgomery County. J. T. STOUT, Chancellor.

SAVAGE & FORT for Complainant.

AUSTIN PEAY for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

P. M. ANDERSON raised a crop of wheat on lands belonging to Mrs. P. K. Ferguson, and sold the wheat to the Dunlop Milling Company. He had not fully paid the rents due on the lands on which the wheat had grown, and Mrs. Ferguson filed the original bill in the first of these consolidated causes to reach and subject the proceeds of the wheat to the payment of the balance due her, claiming the benefits of the landlord's lien. Anderson,

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before he sold the wheat to the milling company, had mortgaged it to secure certain of his creditors, and these creditors claim that they are entitled to the proceeds under their mortgages; and the chief question at issue here is who is entitled to the proceeds, Mrs. Ferguson, the owner of the land on which the wheat grew, or the creditors of Anderson who held mortgages on it.

After Mrs. Ferguson's original bill was filed, setting out Anderson's indebtedness to her and seeking to enforce her lien on the proceeds of the wheat, the Dunlop Milling Company filed the original bill in the second of the above styled causes as a bill of interpleader, setting out and alleging that it had bought the wheat from Anderson, for which it agreed to pay \$750.56, which sum of money was still in its possession; that in addition to the claim being made by Mrs. Ferguson to the proceeds, various of Anderson's other creditors had taken judgments against him and had had executions issued thereon and garnishment notices served on it; and also that T. C. Booth and C. B. Lyle held duly recorded mortgages by which Anderson had conveyed to them the wheat to secure certain sums due them from him, and that they were also claiming the proceeds; and it prays that all the various claimants be enjoined from proceeding with the suits that had been instituted and required to interplead and set up their claims in the suit brought by it, and that it be permitted to pay the money into Court and be discharged from further liability. The money was accordingly paid into Court, and, it appearing that there is not sufficient funds derived from the sale of the wheat to pay any more than the creditors holding mortgages and the amount due the owner of the lands, the controversy has narrowed down to them.

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C. T. Booth answered the bill of interpleader, setting out and showing that his mortgage was executed to secure an indebtedness of \$600.00, and denying that Mrs. Ferguson was the owner of the lands or that she was entitled to or had any lien on the funds in controversy, and also insisting in effect that if she had ever had any lien she had surrendered and waived it before her bill was filed. Defendant Lyle also answered, making substantially the same contentions, showing that there was a balance due him of \$50.00. Mrs. Ferguson answered the bill of interpleader, setting up the same things set up in her original bill.

The Chancellor, on the issues thus made up and depositions taken in the causes, found and decreed that there was a balance due Mrs. Ferguson from Anderson for rents the sum of \$600.00, with interest, and declared a first lien in her favor on the funds then in the hands of the Clerk and Master. From that decree Booth and Lyle appealed to this Court.

It is insisted by appellant, first, that the Chancellor erred in decreeing that the relation of landlord and tenant existed between Mrs. Ferguson and P. M. Anderson and that he owed her anything because of any such relation. They insist that Anderson was the purchaser of the lands on which the wheat grew, rather than a tenant, and that, therefore, there could be nothing due from him as tenant, and that no lien could arise because of any such relation. This insistence grows out of the fact that the contract made by Anderson, and under which he took possession of the lands, was a verbal contract to buy, but, as all the witnesses show, he had the option of either purchasing or paying rents. A more detailed statement of the facts in this regard shows the following: Anderson is the son-in-law of J. H. Ferguson and his wife, Mrs. P. K. Ferguson.

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The Fergusons desired their daughter, Mrs. Anderson, to have a home. Mrs. Ferguson was vested with title to a considerable boundary of land, and it was agreed that they would sell to P. M. Anderson one hundred and fifty acres of that boundary at the price of \$7,500.00, but there appears to have been some uncertainty as to his ability to make the payment, and, at the time it was agreed that the land would be sold at the price named, it was also agreed, to state it in the language of J. H. Ferguson, who represented his wife in making the trade, "that if he (Anderson) could not pay for the land he was to pay a reasonable rent for the years 1909 and 1910 if he kept it." In the language of Mr. Anderson: "Mr. Ferguson stated that at any time I became dissatisfied with it, or could not pay for it, or did not want to pay for it, that he would not hold me obligated; that all he wanted would be rent for the time I kept it"; and, in fact, there is no controversy about its being agreed that Anderson might, at his option, become tenant and pay reasonable rents rather than pay the \$7,500.00 and take the land as purchaser.

This contract was made in the latter part of the year 1908, and not until in the summer of 1909, during which summer the wheat in question was matured and harvested, did Anderson exercise his option to become a tenant rather than a purchaser; and the contention of appellants is that, as Anderson was holding as purchaser at the time the contract was made between him and Mrs. Ferguson and for months thereafter, he cannot be converted into a tenant so as to place the owner of the lands in the position of a landlord and give a lien for rents; and many of our decisions are cited and relied on in support of that contention, particularly the cases of *James v. Patterson*, 1 Swan., 309; *Sullivan v. Ivey*, 2 Swan., 487;

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and *Ballow v. Motheral*, 5 Bax., 600. We have examined these and all of the other cases relied on, and are of opinion they are not controlling. In none of those cases was there any agreement that the parties who had contracts to purchase should at will or otherwise become tenants, but in each of them the question was the relation of one who had contracted to purchase and had continued to insist on his rights as purchaser. We do find cases, however, that involve the precise question here under consideration.

In *Collins v. Whigham*, 58 Ala., 438, the owner of lands contracted to sell, payments to be made in three annual installments, stipulating that if the purchaser failed to make the payments as agreed he should pay so much rent each year he remained on the premises, and a bond for title was executed by the seller and notes for the purchase money were given by the purchaser. A third party with notice of this agreement to pay rents on failure to pay purchase money, but before the first installment of purchase money was due, and before there had been any default in its payment, bought part of the crops. Subsequently default was made in the payments of purchase money, and the would-be purchaser became a tenant. It was held that the landlord had his lien, as such, on the crops, the Court saying that when the election to become tenant rather than purchaser has been made, 'the act must be referred to the time of the making of the contract, and the relation regarded as commencing and continuing from that time,' and that this was true as to third parties acquiring rights with notice of the relations of the parties.

This holding met the approval of the Supreme Court of Alabama in the later cases of *Thornton v. Strauss*, 79 Ala., 164; and *Foster v. Goodwin*, 82 Ala., 384.

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Bacon v. Howell, 60 Miss., 362, goes even further. In that case Mrs. Bacon bound herself by bond for title to convey certain lands to one Saffold on the payment of \$750.00, in three installments, for the security of which Saffold executed his three promissory notes. Contemporaneously therewith a contract was entered into by which it was agreed that if Saffold was not able to make the second payment, not due for more than a year thereafter, he was to pay rent for the lands at a stipulated price per acre. In the meantime, and before any default in payment, Saffold, the purchaser, applied for and obtained a loan on securing it by deed of trust on the crops to be grown on the lands. The lender was shown the title bond, but had no actual notice of the agreement to pay rent in the event Saffold defaulted in making the second payment of purchase money. That payment was not made, however, and Mrs. Bacon, the proposed seller, sued out an attachment to enforce her lien for rents on the crops which had been mortgaged; and the question was which had precedence, the landlord or the mortgagee. The trial Court held the landlord estopped from asserting her lien. The Supreme Court, on appeal, said:

"If the legal effect of the execution and delivery of a bond for title is such as to warrant the world in dealing with the obligee therein in possession of the land as owner, the judgment must be affirmed; but if it is the duty of one dealing with a person so circumstanced to inquire further of the character of his possession, the judgment must be reversed. The possession of land by another than the true owner, when no other facts or circumstances are shown, is presumed by law to be held by the consent of and under the owner, and it is incumbent upon one dealing with the tenant to inquire into the character of the right by which he holds, and the information, to bind the owner, must be derived from him, and not from the tenant.

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"A bond for title is not a conveyance of land, but a mere contract to convey upon a certain contingency, usually the payment of the purchase-money. The duty of the obligor and the right of the obligee are correlative, and the bond is the measure of both. Unless possession is delivered under, or the right to it provided for, by the contract of sale, the seller may retain it until the buyer, by compliance with his contract, entitled himself to the title and, as incident thereto, to the possession. 1 Sugden on Vend., 276; *Baum v. Dubois*, 53 Pa. St., 260; *Irvin v. Bleakley*, 67 Pa. St., 28; 6 B. & C., 527; 9 Dow & Ry., 529, which is silent as to possession.

"Mrs. Bacon, by the bond, bound herself to convey the land to Saffold, not absolutely and presently, but conditionally, when the purchase-money should be paid. Until this was done she was the owner of the land, and as owner could lease it to another, or to the buyer, without in any degree violating his rights under the contract.

"Those who dealt with Saffold were bound to take notice of the legal limits of his rights under the terms of the contract he held.

"Attmore, the creditor, was mislead, not by the bond for title, for that did not import the right to the possession of the land, but by mistaking and imputing to it a broader effect than is given by law.

"Reversed and remanded."

The holding in this case is approved and followed in the later case of *Abernathy v. Green*, 11 Southern, 186, and to the same effect as all these cases is 1 Tiffany on Landlord and Tenant, pages 314, 315.

Such is the well-settled law.

Now, applying these legal propositions to the case at bar, we are of the opinion that the mortgages, and especially Booth, are not in a position to insist that Anderson

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was not the tenant of Mrs. Ferguson. We are of the opinion that Booth was put on notice of the fact that Anderson sustained, or might at his option sustain, the relation of tenant to Mrs. Ferguson. The facts putting him on notice are these: Before he took the mortgage on the wheat he had a mortgage on some tobacco and some live stock, and Anderson, being pressed by some of his other creditors, in order to raise funds to meet their demands, went to Booth and asked that he release the tobacco and live stock covered by the old mortgage and take a new mortgage on the wheat and other live stock. Pursuant to this request by Anderson the two, Anderson and Booth, went and saw Mr. Ferguson, the husband of the owner of the lands, about placing the mortgage on the wheat, and obtained his permission to so place it. Booth, when asked in his deposition why he went to see Ferguson about this matter, answered: "Because I wanted Mr. Ferguson's consent, knowing this crop was raised on his place," referring to the crop of wheat. Anderson, when asked for what purpose they went to see Ferguson, says that it was for Booth's own satisfaction, that "he (Booth) wanted to know if it would be satisfactory with Mr. Ferguson to exchange the mortgages."

Thus is disclosed the fact that Booth realized that it was necessary, or at least proper, to see Ferguson, who it was known controlled the lands for his wife, and get his consent to place the mortgage on the wheat; and, under the holdings, we think he must be charged with notice of the relations between Mrs. Ferguson and Anderson. In fact, we think all the cases referred to go even further than it is necessary to go in the case at bar to charge him with that notice.

The settlement of this question, however, is not conclusive of the case, for it is next insisted by counsel for ap-

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pellants that Mrs. Ferguson is estopped to claim a lien against Booth because of the permission given by her husband to place the mortgage on the wheat; and it can be here stated that the uncontradicted evidence is that Mr. Ferguson agreed that the mortgage thus placed on the wheat might be a first lien on it. But counsel for Mrs. Ferguson insist that by virtue of our statute enacted in 1879, and carried into Shannon's Code, section 4237, the husband could not so act as to bind or estop his wife in the matter of claiming her rents or asserting her rights thereto under the law. The statute referred to, as is found in the Code, is as follows:

"The rents and profits of any property or estate of a married woman, which she owns or may become seized or possessed of, either by purchase, devise, gift, or inheritance, as a separate estate, or for years, or for life, or as a fee simple estate, shall in no manner be subject to the debts or contracts of her husband, except by her consent, obtained in writing. This shall in no manner interfere with the husband's tenancy by the curtesy."

The Chancellor, as his decree in the cause shows, held this statute controlling. In so holding we are of opinion he was in error. In *Brasfield v. Brasfield*, 12 Pickle, 580, our Supreme Court had under consideration the rights of a husband to the rents of his wife's realty. After stating that "At common law the husband was entitled to the usufruct, the rents and profits of his wife's lands, during the existence of the marriage relation, and, upon birth of issue, to tenancy by the curtesy after his wife's death," and calling attention to the holding under an Act passed in 1849-50 Shan. Code, section 4234), which forbids the sale of the husband's interest in his wife's realty for the husband's debts, and prohibits the husband's selling the wife's realty during her life without her joining,

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the Court takes up and considers the Act passed in 1879, and says of the scope and effect of this Act:

"The whole purpose of the Legislature was to prevent the seizure by the creditors of the husband, of the usufruct of the wife's land, and thereby diverting it from the support of the family. In the opinion of the Court, the husband is still entitled to the rents and profits of his wife's general estate."

In the case of *Jones v. Ducktown Sulphur, Copper & Iron Co.*, 1 Cates, 375, 386, 387, it is said, "The husband is entitled to the usufruct, the rents and profits, of the wife's lands owned by her in fee, while the marriage relation continues. However, during the life of the wife he receives these rents and profits as the governor of the family, and for the benefit of himself and family. He cannot contract them away without his wife's consent in writing, nor can they be levied on for his debts; but having collected such rents, or having lawfully realized the proceeds of the usufruct in money, he has the right to dispose of them at his discretion. Acts 1879, Chapter 141; *Ables v. Ables*, 86 Tenn., 333 (9 S. W., 692; *Brasfield v. Brasfield*, 96 Tenn., 580 (36 S. W., 384).

It is clear from these expressions of our Supreme Court, and in fact from the very wording of the statute itself, that Acts 1879, Chapter 141, relied on by counsel for Mrs. Ferguson and treated by the Chancellor as controlling, does not apply to the case at bar for the reason that that statute protects the rents and profits of the wife's property from the husband's creditors, and does not interfere with the husband's rights thereto. Booth and Lyle are not creditors of Mrs. Ferguson's husband, and, therefore, the statute has no application to them.

We are of opinion further that if the lands owned by Mrs. Ferguson and on which the wheat sold to the milling

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company was raised, were her general estate, under the holding in the Brasfield case, just quoted, and other cases in line with it, the husband would have the right to control the rents, and that on that ground his agreeing that a mortgage might be placed on the wheat would bar his wife's assertion of a lien; but this view of the case does not fully meet the situation, the lands not being the general estate of Mrs. Ferguson. The facts are that many years ago—perhaps twenty-five—Mr. Ferguson made a deed conveying the lands on which the wheat was grown to his wife and children. This deed is not in the record, but the fact that he made such conveyance is testified to by him without objection, and is not contradicted. And under the holding in *Bingham v. Weller*, 5 Cates, 70, any title thus vested in the wife by the deed of the husband became her separate estate, so that to the extent to which Mrs. Ferguson became vested with title under her husband's deed the lands were her separate estate. There is no direct proof of just what interest she acquired under this deed from her husband, but the evidence is that after her children, to whom the conveyance was made along with her, had reached their majority they joined in a deed conveying to their mother their interest in the lands, and their deed is in the record. It shows that in October, 1905, the children joined in conveying their interests in the lands to their mother, Mrs. P. K. Ferguson; and the evidence is that the conveyance by Mr. Ferguson to his wife and children was without consideration except love and affection, and that the deed from the children to their mother was for the same consideration, and made at the instance of Mr. Ferguson. Thus it is that the title, to all intents and purposes, was from Mr. Ferguson to his wife, the children being a mere conduit through whom it went in part from him to her. Under this state of

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facts, and the holding of our Supreme Court in the late case of *Ferguson v. Booth*, 160 S. W., 67, we think the title to all interests, that conveyed to her by the husband and that conveyed to her by the children, became vested in Mrs. Ferguson as her separate estate. But still this does not necessarily mean that the husband had no control over the rents.

The uncontradicted evidence shows that the husband of Mrs. Ferguson acted as freely in the matter of looking after her lands as if he were the owner. In fact, the evidence is that the whole trade in which Anderson contracted or become tenant as hereinbefore set out, was made with Mr. Ferguson and not with Mrs. Ferguson. Anderson swears that Mr. Ferguson always looked after the business connected with the lands just as if they were his own, and Mr. Ferguson, in effect, admits this. He says, when asked if he had not always looked after the land and dealt with it as his own: "I have always looked after Mrs. Ferguson's business and made any trades that I think are best." And in the matter of agreeing to the substitution of the mortgage on the wheat in lieu of the mortgage on the tobacco and live stock, Mr. Ferguson explains that it was necessary in order that Anderson might have his live stock with which to work the lands, showing that his consenting to the arrangement between Anderson and Booth was in the interest of the cultivation of the lands. It is further in evidence that Mr. Ferguson bought supplies, fertilizers, etc., for the farm. In addition to all this, and the most significant fact in this connection, it is shown that before the mortgage on the wheat was given to Mr. Booth, Mr. Anderson executed a note payable to Mr. Ferguson for \$1,000.00, representing the very rents on which it is now sought to apply the proceeds of the wheat. This note, Anderson swears, was delivered

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there at Ferguson's house, and while he does not say so in so many words, he indicates that it was in the presence of Mrs. Ferguson, speaking of delivering it to "them" at their home in one place, but when his attention is called more specifically to the matter, saying it was delivered to Mr. Ferguson. At the same time he delivered this note, Anderson also delivered a mortgage, securing the \$1,000.00 note, reciting in the mortgage that he was indebted to Mr. Ferguson. This mortgage conveys a crop of tobacco, another and different one from the crop on which Booth had a mortgage. Mr. Ferguson says that he never turned that note over to his wife or transferred it to her, but that he put it among his own papers. He says further that he sold the tobacco which was mortgaged to secure that note, and with the proceeds "paid the debts off the place—farm," and that if there was any balance after paying such debts he deposited it in the bank to *his own credit*. And in addition to all this Anderson says that Mrs. Ferguson had never demanded payment of the note of him. We think this amounted to a conversion of the note by Mr. Ferguson, or as some of the authorities speak of it, a gift by his wife to him, and that at the time she sought to assert her rights to the proceeds of the wheat in satisfaction of the rents, all this having occurred previous thereto, she did not have any such rights.

In *Estate of Hauer*, 140 Pa. St., 420, 23 Am. St. Rep., 245, it is said: "A broad and plain distinction is drawn by the cases between the receipt by the husband of the income of the wife's separate property rents of her separate realty in that case, and the receipt by him of the principal or corpus of her estate. A gift of the income may be implied from his receipt of it with her consent, but a gift of the principal will not be presumed from her mere acquiescence in his receipt and use of it"; and,

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quoting with approval from the English case of *In re Flamank*, L. R. 40 Ch. Div., 461, it is said: "It has always been held that while a husband and wife are living in perfect comity, as these were, the receipt by the husband of the separate income of the wife may be treated as a gift of that separate income to him, to be applied for the joint benefit of himself and his wife, as for the maintenance of their household, and the like"; and, continuing, it is said in the Pennsylvania case: "An express consent or acquiescence of the wife need not be shown. It will be implied from circumstances and a course of life consistent with it, and opposed to any other conclusion."

3 Pomeroy's Equity Jurisprudence (3d Ed.), section 1103, is as follows:

"Property of any kind, real or personal, and any interest therein, may be conveyed, settled, or held to the wife's separate use. Her equitable separate estate may, therefore, include estates in fee in lands, in possession or reversion, life estates, estates for years, things in action, securities, specific chattels, or money. Where a wife has a separate estate, the rents, income, and profits thereof are, of course, her separate property; and if the savings of such income are invested by her, the investment so made will also be her separate property. In general, when land or other property is purchased by or on behalf of the wife with proceeds of her separate estate it becomes impressed with the same character. The wife's earnings may also, by the assent of her husband, be her separate property. While equity thus provides a separate property for a wife free from the control of her husband, still she may so deal with it that it will lose that character. If the wife, acting without any undue influence, expressly authorizes or tacitly permits her husband to receive the

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income of her separate property and apply it to his own uses and purposes, or to receive it and apply it for the benefit of the family, it will thereby cease to be her separate property and become his; she can never recall it, nor claim any reimbursement."

In a note to this section the following is quoted from the English case of *Caton v. Rideout*, 1 Macon & G., 599:

"If the husband and wife, living together, have for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should come to the hands of the husband, to be used by him (of course for their joint purposes), that would amount to evidence of a direction on her part that the separate income, which she would otherwise be entitled to, should be received by him. . . . Separate money of the wife paid to the husband, with her concurrence or by her direct authority, to be inferred from her mode of dealing with each other, cannot be recalled."

In the light of these authorities, and of the facts as hereinbefore detailed, we think it cannot be questioned but that Mr. Ferguson was the owner of the note representing the rents, and necessarily of the rents, at the time Mrs. Ferguson filed her original bill and at the time she set up her claim by answer to the bill of interpleader, and it results that her claim must fail.

Defendant Booth does not make the amount of his claim appear with entire satisfaction. He shows that he has received some credits thereon from the proceeds of certain property included in the new mortgage. In one place he swears that there is a balance due him of \$420.00, with interest from April 3, 1909, but at other places he indicates that he had received \$226.00 from the mortgaged property, which, deducted from the secured claim of \$600.00, would leave only \$374.00. After a

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Careful reading of the record we have concluded that the last named sum is the correct amount, and a decree will be entered here for that sum, with interest from the date of his mortgage, April 3, 1909. Defendant Lyle shows a balance due him of \$55.00, but in his answer to the bill of interpleader he claims a balance of only \$50.00, and a decree will be entered here in his favor for \$50.00, with interest from January 2, 1909.

There has been little said in this opinion as to Lyle's claim. It need but be said that his mortgage is not disputed, nor is it questioned that, if Mrs. Ferguson has no lien on the proceeds of the wheat, his claim should be paid out of the fund in Court for which the wheat was sold.

The costs of the case will be paid out of the balance of the proceeds of the wheat in the hands of the Clerk and Master of the Chancery Court of Montgomery County after satisfying the claims of Booth and Lyle.

Gillock v. Barnes.

C. H. GILLOCK v. J. C. BARNES.

Writ of certiorari denied by the Supreme Court.
(*Nashville*. December Term, 1913.)

1. SALE OF DISEASED ANIMALS. *Duty of seller. Bailee.*

It is the duty of the seller of hogs which become diseased between the date of sale and date of delivery to inform the purchaser of this fact before delivery, although the absolute title passed at the time of the contract of sale. And this duty of informing the purchaser rested upon the seller without any additional consideration.

2. SAME. *Duty when animals are exposed to contagious disease or are likely to have it.*

It is the duty of the seller in such case, whether treated as a seller or as a bailee, to communicate to the purchaser the fact that the hogs sold had been exposed to a contagious disease if the exposure and the circumstances were such as were reasonably calculated to generate the belief of the probability that the hogs sold would catch the disease.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. T. E. MATTHEWS, Judge.

J. H. ZARECOR and TURNER & TURNER for Plaintiffs in Error.

J. W. PUCKETT for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

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THIS is an action brought by Barnes against plaintiffs in error to recover damages claimed to have been suffered by him by reason of the selling and delivering to him of two diseased hogs. The case went to trial on plea of not guilty. The jury returned a verdict of \$250.00, and the trial Judge refused to reverse the judgment pronounced on the verdict.

The first assignment of error is that the Court should have set aside the verdict and granted a new trial because there was no evidence to support the essential averments of the declaration. The material allegation was that defendants below had sold and delivered to Barnes two hogs, knowing at the time that they were infected with the disease of cholera, or that if they were not aware of it, that they ought to or should have known it. It will be noticed that this is not an action for breach of warranty, but a suit for deceit or negligent ignorance amounting to wrongdoing. There was some testimony upon which the jury could predicate their finding that the Gillocks actually knew of the existence of the disease, or should or would have known of the disease in the exercise of reasonable care and conducting themselves toward Barnes in good faith, as they were in duty bound. The evidence along this line is somewhat meager, but we find testimony in substance that the hogs of plaintiff in error became ill some days before the day on which the two were shipped to Barnes, and that four or five had died, and that on the day succeeding the shipment a veterinarian was on the premises and prescribed hog cholera serum. We do not think the declaration of this doctor that he did not diagnose the disease as that of cholera conclusive. If one of the hogs had cholera on the day on which it was shipped, it necessarily follows that it had the disease prior to and just preceding the time of shipment. This alone was a

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fact or circumstance from which the jury could have inferred that the Gillocks either knew of the existence of the disease or ought to have known of it and should have taken steps to prevent the communication of the scourge to the swine and the premises of Barnes. Hence we are unable to say that there was no evidence to support the finding of the jury. The first assignment of error must therefore be overruled.

It is earnestly insisted that the Gillocks could not be held responsible unless it were shown that they actually knew of the existence of the disease. We do not give full assent to this proposition. If the circumstances were such as to lead reasonable men to make inquiry as to the condition of the hogs, or if the circumstances were such as would suggest to the ordinary farmer or stock raiser the probable existence of an infectious or contagious disease, it was the duty of the keepers and owners of the afflicted hogs to inform the buyer or consignee. This certainly was a breach of the duty of reasonable care and fair dealing by one man to another, to say nothing of a special obligation due to anyone with whom a contractual relation existed. It was the duty of the owners under those circumstances to retain the hogs upon their premises until the extirpation of the disease, or to inform the owner.

Much stress is laid upon the lack of consideration to support any contractual or legal obligation between the Gillocks and Barnes for the breach of which an action can be brought. The predicate of this argument is the fact that the two hogs in question were actually sold in September, 1911, and were to be retained by the Gillocks for breeding purposes free of charge until some two months later. In other words, it is the contention that the Gillocks were to keep and feed the hogs as an accommodation to Barnes. On the other hand, there is evidence which

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would warrant the finding that it was a part of the contract that the Gillocks were to keep and breed the hogs and deliver them safely at the express office of the defendant in error. But after carefully considering this question we are of opinion that it was immaterial whether it was a part of the contractual obligation to keep the hogs or that it was done as a mere favor. It was a breach of legal duty to crate hogs and send them on the way to the premises of the defendant in error without informing him of their diseased condition: 2 Cyc., 332, 333. By virtue of the rule just announced the Gillocks would be liable to a total stranger. Good conscience, common honesty and the duty of refraining from injuring anyone required disclosure of the danger.

Upon the whole case we are of opinion that the merits have been reached, and that Barnes did not recover any more than that to which he was entitled. We feel constrained to overrule all of the assignments of error and to affirm the judgment with costs.

Chism v. Railway & Light Co.

L. B. CHISM v. KNOXVILLE RAILWAY & LIGHT COMPANY.

Writ of certiorari denied by the Supreme Court.

(*Knoxville*. September Term, 1913.)

STREET RAILWAYS.—*Carrier and Passenger. Negligence in alighting. Question of law or fact.*

It is error in the trial Judge to hold as a matter of law that a passenger upon a street car who alights at a time when he is under the impression that car had practically stopped is guilty of negligence barring recovery, although as a matter of fact the car had not come to a complete standstill.

FROM KNOX COUNTY.

Appeal in error for the Circuit Court of Knox County.
V. A. HUFFAKER, Judge.

JOHN H. FRANTZ for Plaintiff in Error.

SHIELDS & CATES for Defendant in Error.

MR. JUSTICE WILSON delivered the opinion of the Court.

THIS is a suit to recover damages for personal injuries received by plaintiff in error while alighting from a car of defendant in error. His declaration avers, in brief, that October 6th plaintiff in error became a passenger on one of the cars of defendant in error at a point near the intersection of Gay Street with Park Avenue and paid his fare, intending to go to Home Station, a station or stop upon said line between Knoxville and Chilhowie Park.

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That the conductor of the car had full notice of his intention to disembark at said station, and when said car approached the said station it slowed down and came to a stop, or was nearly to a stop, so as to lead him to believe that it was in the act of stopping, and that it was his duty to prepare to leave the car; that the car was very much crowded, and he attempted to make his exit from the car by passing between the persons standing upon the running board of the car, it being the only method he could pursue in leaving the car; that just as he reached the running board and was in the act of stepping from the car, and when it was too late for him to recover his balance and remain upon the car, the servant of defendant in error in charge of the car carelessly, negligently and recklessly started the same and caused it move and lurch violently forward, which threw him to the ground, bruising, wounding and maiming him seriously and permanently in one of his legs, on account of which he was caused to suffer great pain and anguish, was confined to his room and put under the charge of a physician for two months, and was seriously and permanently injured to his damage five thousand dollars, for which he sued and demanded a jury to try the issues involved in the case. The defendant in error interposed the plea of "not guilty." The case came on for hearing before the Judge November 23, 1912.

It appears that the parties by their attorneys agreed to waive a trial before a jury and to submit the entire case to the Court.

His Honor, the trial Judge, stated that having fully considered the pleadings, the wayside bill of exceptions, and the entire record in the case, including all the proof submitted upon the former trial, adjudged that plaintiff was not entitled to a recovery, and, therefore, adjudged that his suit be dismissed at his cost and that of his surety on his prosecution bond.

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Plaintiff in error moved the Court for a new trial, which was overruled, and to this action he excepted and prayed an appeal in error to this Court, which appeal was granted, proper appeal bond having been given.

The bill of exceptions filed in the case contains only the evidence of plaintiff below with respect to the place and how the accident occurred. Other evidence introduced by him shows the nature and extent of his injuries and his sufferings resulting therefrom. The plaintiff in error, at the time he gave his evidence, was sixty-one years old. He lived at Little Crab, in Fentress County, Tennessee. He was engaged in the mercantile business at Little Crab.

He also owned a farm. He had lived in that county something like thirty-five years. He was County Judge of the county eight years. He was also, it appears, a minister of the gospel and preached. He came to Knoxville in 1910, on the 5th of October, for the purpose of buying goods for his store at Little Crab. The Appalachian Exposition was in session at that time. Roosevelt was to be here, and the town was quite crowded, and he was stopping at a Mr. Meadows, out near Park City. The reason he went out there was that it was suggested to him that the city was crowded. This was on the sixth day of October, 1910. He stated that he was going out to Home Station, on the Chilhowie line, to get off at said station, and stopped with Mr. Bowman, who lived about a quarter of a mile from said station. He then testified where he got on, near the Hotel Atkin; that he paid his fare. That a Mr. Ragan was with him. He states that, as he remembers, he was on the second or third seat from the front of the car. That it was an open car; that he sat down on the right hand side of the car. That the car was crowded; that it was between nine and ten o'clock at night when he

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started to step off. That he told the conductor where he wanted to get off.

He was asked to state, in his own way, when he came to the place where he wanted to get off what happened. His answer was: "Well, when the car run down there my impression was that I had nothing to do except with the right hand side, which was open, and on the left the bars were up, and that threw me to get out before Mr. Ragan, who was sitting on the same bench, I think on the same seat, and so I made an effort to get off, and my impression is, that, when I stepped down on the running board, and, as I was making the step to touch the ground, I think they turned the car loose. It threw me about—well, of course I could not say exactly, but it appeared like it was ten or twelve feet from the cars. I lit on my hands and knees; that was the position I was in; that is the way the car threw me."

The railway and light company introduced no evidence in the case, except that of Mr. Herrell, the law agent of the company at Knoxville, who had filled the position for a year. The substance of his testimony is, that he had made a thorough investigation of all the motormen and conductors on the Chilhowie Park Line that were running at the date of the accident, the date it is claimed to have happened, and that he had been unable to find out any of those men that knew anything about the accident. He further states that no employe of the company, motorman or conductor, had made any report of the accident.

Now, in the cross-examination, the plaintiff in error, the counsel of the railway company, persistently pressed him with the question as to whether or not he would swear that the car had actually, *entirely*, stopped when he started to step off, and the old gentleman continually answered that it had practically stopped as it appeared to him, and

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that is all the substance of the evidence in the record that it had practically stopped, although it may not have entirely ceased to move when the old gentleman arose and stepped on the running board to step off, when the car suddenly lurched forward and threw him to the ground.

This is all the evidence in the case, and the learned trial Judge seemed to proceed to a judgment upon the idea that, if the car had not entirely stopped when he arose and stepped on the running board and started to step off, even if it was going five inches an hour, and it suddenly lurched forward, that the plaintiff in error could not recover.

We do not believe that is the law.

To so hold would run counter to the action and conduct of ninety per cent of cautious and prudent citizens who alight from street cars. The question is, under the evidences given by the plaintiff in error, was he guilty of such contributory negligence as approximately caused his injuries, or caused him to fall from the car, or tended to contribute to his fall, by virtue of any slight movement of the car forward.

In other words, we hold that when a car has practically stopped at a station where the conductor knows a passenger is to alight, he will not be held guilty of contributory negligence in going on the running board of an open car and starting to step to the ground, and if a car suddenly lurches forward, when he is in this position and in the act of stepping from the running board to the ground, the company will be guilty of such negligence as may make it liable under all the circumstances.

The judgment of the Court below is reversed and the cause remanded for a new trial. The railway and light company will pay the costs below.

Wiles v. Lightman.

MRS. TENNIE WILES, ADMINISTRATRIX, v. JOSEPH
LIGHTMAN.

Affirmed by the Supreme Court.

(Nashville. December Term, 1913.)

1. MASTER AND SERVANT. *Safe place. System of Signaling.*

If a system of signaling or warning servants while at work be necessary for the reasonable safety of the servants, the master is guilty of a breach of duty in failing to provide therefor.

2. ASSUMPTION OF RISK. *Burden of Proof.*

It is incumbent upon a master who relies upon the defense of assumption of risk to show that the risk was an ordinary incident of the work, or that the servant expressly assumed it, or that he was fully aware of and appreciated the danger and agreed expressly or impliedly to continue in the service notwithstanding.

3. VICE PRINCIPAL. *Authority of. General superintendent.*

A general superintendent of an enterprise, vested with the power to manage the same, has the authority to select any number of and such foremen as he deems necessary for the carrying on of the business, and the master will be liable for the negligent orders of such selected foremen as are discharging duties which the master owes the servant.

4. SAME. *Test of authority and of common employment.*

If the servant is injured while discharging a duty or obeying an order declared or made by the sub-foreman, the question as to whether the master is liable is to be determined by the nature of the duty or the order rather than the rank of the sub-foreman or servant.

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5. NOTICE, SIGNAL OR WARNING.

It is negligence for a foreman to send an inferior servant into a place of danger without warning him thereof and without providing means of signaling him when shifting or changing conditions which will affect his safety are to occur.

FROM DAVIDSON COUNTY.

Appeal in Error from the Second Circuit Court of Davidson County. M. H. MEEKS, Judge.

E. A. PRICE, JAMES T. MILLER, and JOHN T. LELLYETT for Plaintiff in Error.

CHAS. C. TRABUE for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS is a suit for damages for the alleged wrongful killing of the husband of Mrs. Wiles by the negligence of his employer, Joseph Lightman. At the conclusion of the evidence, the trial Judge directed the jury to return a verdict against plaintiff below. She excepted, prayed and perfected her appeal to this Court and has assigned errors. We shall in this opinion refer to the parties as plaintiff and defendant, respectively, just as they stood in the trial Court.

The declaration contains three counts. An analysis brings to light the following as its component parts: In December, 1910, defendant was the owner and operator of a quarry and stone crusher at a place just beyond the city limits of Nashville, and adjacent to the T. C. R. R. On the 13th of that month and for some two months

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preceding, the husband of Mrs. Wiles was engaged as a laborer at this crusher. On the day named, and while engaged in working in or upon a part of the crusher, to be hereinafter described, he lost his life. This industry is divided into departments or sections. There was a quarry from which the stone to be subsequently crushed was taken. Adjacent or near to this quarry was the mouth or receptacle of the stone crusher into which the rocks were to be pitched and ground up. From this crusher there extended outward and downward to a large bin what was known as a chute through which the crushed stone passed into the bin just referred to. This bin, as its name suggests, was a large receptacle placed at the mouth of this chute for the purpose of catching and storing up the stone that had passed through the crusher. This bin was approximately ten by twelve feet in length and breadth and some twelve feet in depth. It was made of heavy timbering and planking. In or near its center was a trap door, about 13 by 14 inches in dimensions, through which the crushed stone was intended to and did pass into cars placed beneath for that particular purpose. The bottom of this bin was elevated several feet above a railroad side-track, the purpose of the designer of the industry being to have the cars pushed beneath the bin and the trap door opened and the garnered contents of the bin poured into a car by force of gravity. This trap door was opened by means of a lever connected with the exterior part. Just how the lever is worked is not specifically averred, other than as above indicated. The tendency or the result of the working of the chute described above was to cause the accumulation on the bottom of this bin and near the mouth of the chute of large heaps or quantities of the finely crushed stone in such way and in such position as to choke up this chute and stop the crushing machinery.

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It was necessary to have someone go in or stay in the bin during the operating of the crusher for the purpose of spreading out these accumulations so as to prevent the choking and stopping of the machinery. The husband of plaintiff was engaged at this quarry and crusher, as an ordinary laborer and to do things in general, but the doing of this work of keeping the chute clean was not one of his duties. On the day named, while deceased was performing labor in the quarry, he was called therefrom by order of defendant through his representatives and ordered to go into this bin and perform the labor of removing accumulations from the mouth of the chute; and it was further alleged that it was his duty to obey this order and that he did so, and while so doing the trap door mentioned was thrown or drawn, causing his body to descend rapidly toward the aperture and to be crushed and killed by the precipitating of the accumulated stone in the bin; that Wiles was not cognizant of the dangers and risks of this place and instrumentalities, and had no opportunity to familiarize himself therewith, but that of these dangers the defendant was fully aware or should have been cognizant, and yet that the defendant gave Wiles no notice or warning of the dangers to which he would be subjected, nor made any effort to equip him for the performance of this hazardous duty, and further, that defendant was aware of the inexperience and lack of knowledge of Wiles before and at the time he was ordered to enter the bin; that this bin was dangerous, unsafe and imperfect, in that it was dark because of the dust, having just one small window or aperture near the chute, and because it was not equipped with cross bars or hole to which the laborers could cling while shoveling back the accumulated stone, and because there was no arrangement or equipment by which the servant could be warned or

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signaled when the trap door was to be sprung, and, further, that while Wiles was thus performing his duty, the defendant through his superior servant negligently failed to inform or arrange to inform Wiles of the time of the springing of the trap or of the consequent dangers, and failed to signal or inform him when this was to be done, in consequence of all which he was injured and killed as set out.

The reason why the learned trial Judge instructed the jury to return a verdict for defendant does not appear in the record. It was stated, however, by counsel at the bar, that he took this course upon one or possibly two grounds—namely, that if there was any negligence which proximately brought about Wiles' death, it was that of a fellow servant, and that Wiles was cognizant of all the dangers and assumed the risk.

We are not called upon at this junction to determine whether or not at all hazards the plaintiff was entitled to a recovery, but whether her case upon any of its many aspects should have been submitted to the jury. Responding to this point, we have reached the conclusion after mature deliberation that the defendant through learned counsel has not shown us, nor have we by independent search been able to find, any satisfactory legal basis upon which Mrs. Wiles can be precluded from having her case passed upon by the triers of the facts. Our difficulty has been in determining and limiting the grounds upon which we shall direct a reversal.

In condensed form and without bearing in mind the separateness of the three counts, it is fairly deducible that the declaration sets forth the following grounds of recovery: 1. Breach of duty of the master in furnishing and maintaining a safe place and suitable appliances. 2. Breach of duty in calling the servant from his course

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of employment and setting him to work on a different employment without instructing him as to the dangers and risks of the new employment. 3. Negligently exposing the servant to unnecessary hazards of the new employment while he was acting in obedience to a direct command. 4. Negligence of the vice principal in moving or shifting the machinery and plants without giving the servant notice or warning of the time when this movement was to take place. While not expressly averred, we are of opinion that there is sufficient in the declaration to give rise to another ground of liability—namely, that of negligence of the master in failing to adopt a satisfactory or adequate system for the safety and protection of employes while in the discharge of their duties.

We shall not undertake to refer to nor quote from all the authorities presented by the learning and industry of counsel for plaintiff and defendant. We deem it unnecessary. We wish it understood, however, that we have examined practically all of them and have obtained from them light that will be reflected to some degree in this opinion.

The most prominent feature of this case as we view it and as was conceived by learned counsel who drafted the brief, is that of breach of duty of the master to have furnished Wiles a safe place in which to work. In treating this phase we are going to assume that Wiles was employed as a common laborer at the crusher and that he had never before the day of his death been assigned to duty in the bin; and, further, that Bess had authority from the *alter ego* of the master to call Wiles from his labor in the quarry and command and direct him to go into the bin and shovel the crushed stone that was accumulating in the bin at the mouth of the chute. We are likewise going to assume that the work of shoveling the

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accumulating crushed rock from the mouth of the chute and of shoveling this material to the outer portion of the bin was under the control and supervision of Bess. It suffices to say that there is much evidence tending to show the above assumptions. In fact, there is not much controversy but that Brown, the *general superintendent* of Lightman, had the authority, too, and had pursuant thereto assigned to Bess that part of the work of this industry which consisted in caring for the bin and chute and the opening and closing of the trap door as an incident to the emptying of the bin and the loading of the cars.

No authorities need be cited to sustain the proposition that whether the master has complied with his duty of exercising reasonable care to provide a safe place and suitable appliances in which and with which his servant is to perform his duties is one for the jury, unless the facts are so clear with respect to freedom from negligence as that nothing is shown upon which the jury can speculate. Nor need we encumber this opinion with case after case and authority upon authority to the effect that this duty of the master is primary, absolute and non-delegable. Another and a very apt and happy expression is that the master contracts with the servant that he will exercise all reasonable care with respect to the construction and maintenance of the place to which the servant is assigned to see that the place is reasonably free from unusual hazards or risks, and that he will not expose the servant to unnecessary and unusual risks which can, by the exercise of reasonable effort and reasonable care be obviated or eliminated. A further elaboration might be that the master contracts with the servant that he will exercise reasonable care and forethought as to the structures of the industry and its adjuncts and as to appliances to see that and safeguards will be used and harm-impend-

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ing conditions removed that will enable the servant to perform his duties with reasonable safety. While prefacing these propositions with the statement that no authorities need be cited, we, out of deference to counsel and to custom, refer to the following: *Iron Company v. Hamilton*, 107 Tenn., 705; *Iron Co. v. Pace*, 101 Tenn., 475; *Morris Bros. v. Bowers*, 105 Tenn., 59; *Guthrie v. Ry.*, 11 Lea, 372; *Thompson on Negligence*, 3873, 3874; *Wilson v. Merry*, 19 Eng. Rul. Cas., 138; *Smith v. Baker*, 1891 App. Cas., 325, reported in 60 Q. B. Law Jour., 683. In the first English case just cited, the Lord Chancellor uses the following luminous words in stating the obligation of the master: "He contracts with the servant that he will exercise reasonable care to see that safe and adequate machinery is provided," clearly implying that he meant by this that the master was to supply such machinery as was suitable to the work assigned to the servant, and such as could be used by the servant with reasonable safety to himself while engrossed with the performance of his duties.

Applying these rules to the evidence in this case, or rather to those facts which the evidence tends to support, there appear grounds and reasons upon which a verdict convicting the master of this breach of duty can be predicated. That Wiles upon being sent into the bin was exposed to hazards because of the construction of the bin and its method of operation is apparent. That this department of Lightman's industry was not arranged with reasonable regard to the safety of those who might have to go into the bin is likewise clear; and that reasonable care and prudence would suggest a different system of operations and a readjustment of the bin so as to enable the servant assigned to this duty to perform his labors with reasonable safety is also evident. This being so, there

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necessarily followed the right of plaintiff to have this theory of her case submitted to the jury. It will be observed that we are pretermittting for the present a discussion of the defenses of assumption of risk and common employment.

We treat as an idle assertion and as having no juristic value the statement of Lightman that he did not dream that a man would ever be caught like Wiles was, or that his equipment would ever be made the instrument of death or exposure of any of his servants to unusual hazards. There is evidence tending to show that it was absolutely necessary for someone to go into this bin at intervals and clear the chute, and that this was known to Brown, the general superintendent, if not known to defendant. At all events, this method of work had been pursued a sufficient length of time to justify the presumption that Lightman knew of it, or ought to have known of it, and that this was an established and well understood method and custom. It is overwhelmingly shown that the bin was so dusty that no one could see very well, and that the noise of the machinery was so great that it was extremely doubtful whether anyone could be heard from the outside. It is apparent that this situation was extremely hazardous to the man inside when the trap door was opened unless notice of this movement were given him and he allowed time in which to get to the side of the bin or to another place of safety. And yet there is abundant proof to the effect that no method of signalling or appliance for signaling was ever adopted, established or observed. We refer to the following authorities as upholding the view that where signals must be given or warning communicated to a servant in order to enable him to perform his duties with safety, the master is liable. These cases go to the extent of holding that it is the absolute duty of the

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master to arrange a signaling system or apparatus and to see that it is carried out whenever the place of work but for this signaling would be an unsafe one: *Cheenev v. Ocean S. S. Co.*, 92 Ga., 726; *Ford v. R. R.*, 12 L. R. A., 454; *Hastings v. Lumber Co.*, 19 Ore., 522; 25 Pac., 358; *R. R. v. Eberhart*, 91 Texas, 321; *Schwarzschild v. Weeks*, 4 L. R. A. N. S., 515; *The Pioneer*, 78 Fed., 600; *Biggers v. Catawba Power Co.*, 72 S. C., 264; *Steele Co. v. Smith*, 168 Ind., 245; *Brice-Nash v. Barton*, 19 L. R. A. N. S., 749; *Mining Co. v. Wheeland*, 64 Fed., 462, and see extensive note to case reported in 26 L. R. A. N. S., pages 624-642 and 649. Having some bearing on this phase of the case is that of *Iron Company v. Hamilton*, *supra*, and as having direct reference to the issue here see the case of *Casey v. Browning*, 2 Tenn. C. C. A., 358. We might include in this voluminous citation of authorities that of *Haynie v. Coal & Iron Co.*, 175 Fed., 55; but we desire to refer to this opinion later for another purpose. We may as well in this connection dispose of the contention that, conceding the above to be sound, Wiles was familiar with the system and knew the permanent structures of his employer and was aware of the dangers of going into the bin, and that he consequently assumed the risk. It is also earnestly argued that the bin as constructed was not fraught with danger except when a fellow servant intervened and began to move the trap door, and that Wiles was cognizant of all the aspects of hazard and was in position to and did impliedly contract to assume the risk.

It is not clear that Wiles was aware of all the dangers incident to the operation or that he fully understood and appreciated the hazards to which he was exposed when he was called from his labors in the quarry and ordered into the bin. If so, we are of opinion that

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the trial Court can never determine as a matter of law that he did assume the risk. It is true that if he was cognizant of the lack of system, and if he knew the arrangement of the plant and the method of the work and appreciated the dangers incident thereto and needed no enlightenment with respect thereto, he will be held in law to have assumed the risk. But learned counsel insists that we arrive at this as a necessary conclusion. The very statement of this insistence reveals its weakness. It is the province of the jurors to reason upon facts and incidents as the basis for inferences of fact. If they as reasonable men might reach a different conclusion from that at which we should arrive, we would have no right to say that they were in error and that we were correct. There is proof tending to show that Wiles had been on the ground about two months and that he had never been in this bin before, and had never been assigned to duty in or about the bin. We have, therefore, the contention that he should be held cognizant of the dangers simply because he was more or less familiar with the premises. When this is the ground upon which assumption of risk or contributory negligence is predicated, the question presented are those for the jury: *Coal Co. v. Minton*, 9 Cates, 415. It must be remembered that the predicate of this defense of assumption of risk is knowledge of the hazards upon the part of the servant and an express or implied agreement by him to proceed with the work and assume these risks. He cannot, therefore, be held to have assumed risks and dangers of which he was not aware, and the extent and character of which he did not appreciate: *Smith v. Baker*, *supra*.

We are of the opinion that a master cannot insist upon his defense of assumption of risk until he has discharged his duty of reasonable care toward the servant or has

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put the servant in full possession of all the facts and circumstances which subject the servant to dangers. It is axiomatic that a servant does not assume the hazards of the negligence of the master, and that the master has no right to subject him to these dangers without his assent.

Passing to another but cognate phase of the case, it will be sufficient to say that there is evidence tending to support a theory presented by the declaration that Wiles was taken from his regular line or place of employment and sent into the bin by a vice-principal and exposed to unusual hazards without being warned thereof and without being put in possession of knowledge of the instrumentalities for his own protection. That this is a recoverable theory is well sustained by the case of *Coal Co. v. Jarrett*, 111 Tenn., 565.

But it is said that he was a man of ordinary comprehension and needed no instruction, and that the machinery and plant were reasonably safe so long as his co-workers were not negligent, and, hence, that if the servant thus exposed got hurt it was conclusively by the act of the fellow servant. This latter suggestion trenches upon another aspect of the case which must be treated further on. It suffices for the present to say that there was evidence tending to show facts and circumstances from which the jury might infer that Wiles was inexperienced and ignorant of the risks and that his superior called him away from a situation of reasonable safety and thrust him into a position fraught with great danger without giving him any instructions.

The cornerstone of the argument of learned counsel for defendant is in substance that Wiles met his death through the negligence of Bess, who was his fellow servant, and that the master was not guilty of any negligence which

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proximately contributed thereto. It is pointedly stated that the cause of Wiles' taking off was the carelessness of Bess as a fellow servant in throwing the trap door without warning while Wiles was engaged in shoveling materials from the mouth of the chute, and that but for this act Wiles never would have lost his life. Hence, it is said that all other phases of liability might be put aside as having no juridical bearing upon this case. This insistence and the argument in support of it have given us much concern. We have reached the conclusion, however, that even if it were conceded that Bess was a fellow servant of Wiles, there is still enough left in the record to require a submission of the case to the jury upon the questions of safe place and of failure to instruct Wiles as to the dangers of the employment. We reiterate that there is evidence to the effect that the defendant, through Brown as general manager, confided to Bess as *his* representative the right to call Wiles or any one whom he might choose from the quarry and assign him to work in the bin. Bess had this authority, and this authority can be traced through regular channels to the defendant. Hence, for juristic purposes we must treat the case as that of Lightman himself directing Wiles to leave his place in the quarry and take up his duties in the bin. That being so, the instrumentality through which this order was communicated is an immaterial consideration. The doctrine of common employment in such situation has no application whatever. This was decided by the United States Supreme Court in the case of *Railway v. Fort*, 84 U. S., 552; 21 Lawyers' Ed., 739. We certainly do not have to refer to any authorities as backing up the proposition that with respect to the duty of the master to furnish a safe place and adequate facilities, the defense of common employment is out of the question.

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But with respect to the insistence that Bess was acting as a fellow servant, we are constrained to say that that was and is a question which should have been submitted to the jury. It is true that when the facts are not in dispute and when all inferences to be drawn from the circumstances would be the same for all reasonable men, the question of whether two men are in a common employment is one for the jury: *Fertilizer Company v. Travis*, 18 Pickle, 16; *R. R. v. DeArmond*, 2 Pickle, 73. In the latter case it is said that when there is any controversy as to facts upon which the defense is predicated the relation is a question for the jury. Applying that rule to the testimony in this case, we are of opinion that His Honor should have submitted this question to the jury. Whether Bess was representing the master or was a fellow laborer to Wiles was evidently much controverted in the Court below. The vital question that arose was whether Bess in the matter of ordering Wiles from the quarry and putting him into the bin and starting the trap door without warning was representing the master or was simply carrying out a detail of the work. The trial Judge should have submitted to the jury the proper rules by which they were to determine whether Bess had charge of a department of this work and had the authority to direct and control the employment of Wiles and whether it was the duty of Wiles to submit to the guidance and directions of Bess. If so, it seems to us that Bess was representing the master.

It is unnecessary to encumber this opinion with an analysis and comment upon the many cases in Tennessee and elsewhere which deal with this question. We think our own authorities are reasonably clear upon the following propositions: The rank of the servant or his compensation or his age or experience is not a material con-

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sideration, the true test being whether at the particular time and with respect to the work being performed the superior servant stood in place of the master toward the inferior servant. In other words, the question is whether the superior was guiding and controlling the servant as to the time, place and method of work. If so, he was representing the master and was performing toward the servant duties which the master had contracted that he would have performed with reasonable care and caution. See *Coal Co. v. Davis*, 6 Pickle, 718; *R. R. v. Wheelis*, 10 Lea, 740; *R. R. v. Handman*, 13 Lea, 423; *Lawson v. R. R.*, 17 Pickle, 410; *R. R. v. Baldwin*, 5 Cates, 409; *R. R. v. Edwards*, 3 Cates, 31. An additional statement as to tests may be extracted and paraphrased with special reference to the case at bar—"whether power is given by the master to the supervising agent to direct and control the movements of the servant as to when, where and how he shall work and whether the inferior servant was, by the assent of the master, placed in charge of the injured servant's superior with expressed or implied direction to the inferior to obey the orders and commands of his superior, and whether it was the duty of the inferior with respect to the work being done to obey the orders and commands of the superior." We have no hesitancy in saying that when the above deductions from the cases fit a situation under investigation, the superior servant should be held to be a vice-principal. One of the non-delegable duties of the master is to see that no negligent orders are given any of his inferiors with respect to the time, place and method of doing work. 26 Cyc., 1307.

We are not disposed to conclude this opinion without specific treatment of the question as to whether in the matter of giving signals a superior who undertakes to give this notice or who fails to give notice is acting as a

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fellow servant or is a representative of the master. We are well aware of the rule that a vice-principal may become a fellow servant with a common laborer and that if the negligent acts are personal acts of this superior while engaged in the common work, the master is not responsible. But this is a doctrine that must be carefully watched to prevent its being used as an instrument of injustice to injured employes. In the case of *R. R. v. Baldwin, supra*, Chief Justice Shields stated the rule to be that when a servant is injured by the personal act of his vice-principal, the circumstances should be closely scrutinized to determine whether or not it was purely a personal act or whether it was intertwined with an official act or duty, and that when it partook of the nature of both, the act would be held to be official rather than personal negligence. That was a case in which the railroad was held liable for the negligence of a conductor in giving a negligent order or signal while the brakeman and he were engaged in the work of coupling cars. In *Casey v. Browning, supra*, this Court held that it was the duty of the master when an inferior was sent by a vice-principal into a place and set to work, to see that notice or warning of changing conditions was communicated to the servant, and that the master would be liable if a fellow servant by the command of the foreman made the situation of the other fellow servant dangerous by reason of the failure of the foreman to see that warning was communicated to the injured one. This Court unequivocally held that the duty of giving notice or warning in such cases was non-delegable, and that it was not a mere detail of the work. The basis of this contention was that without this custom of warning and its constant observance the place of the servant would not be reasonably safe, and that this would be a breach

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of an absolute duty owing him by the master. This case was affirmed by the Supreme Court. It is insisted that the case of *Fertilizer Company v. Travis*, *supra*, is to the contrary. This may be conceded, but the other holdings are much later and certainly much sounder in view. But even in the Travis case it was said that the fellow servant charged with the duty of arranging and maintaining the signal system represented the master. We have examined quite a number of cases out of this jurisdiction bearing upon this question, and have reached the conclusion that the best reasoned ones are in line with our holding here. *Stone Co. v. Monney*, 39 L. R. A., 839; *Cody v. Longyear*, 103 Minn., 108. See also 104 Minn., 138; 82 Ark., 188; 40 Washington, 276; 43 Mo., 87; 64 Fed., 462; 43 N. Y., Supp., 118; *Fliege v. R. R. Co.*, 50 L. R. A. N. S., 734. See also the case of *Walton v. Birchell*, 13 Cates, 715, as authority for the proposition that when the act of the foreman consisted of his failure to give proper warning of the discharge of dynamite it was official. The opinion in *Haynie v. Coal Company*, 175 Fed., 55, succinctly sets forth the rule which this Court thinks should be adopted in this jurisdiction. It was there held that when the superior, pursuant to authority confided to him by the master, orders an inferior into a place or puts him in a position and directs him to perform duties which require his attention, it is the duty of that foreman representing the master to see that that situation remains reasonably safe while the servant is so engaged, or else in person or by other agencies communicate to him notice or warning that there is to be a shifting of machinery or materials that will probably endanger the servant. This rule should be laid down and rigidly observed, and the overworked doctrine of common employment, while in force in Tennessee, should never

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be resorted to to defeat the claim of the servant thus injured.

We do not wish to be understood as holding that in all cases the mere failure to give signals would make the master responsible. We can conceive of an industry so arranged and systematized as that the master could, in the exercise of due care, leave mere details to his laborers. But the failure to give notice to a servant who is sent into a place of danger to perform a duty which can be rendered unsafe unless warning is given, or if the giving of signals so far partakes of an order or direction as to when and how the servant shall work, and when he has the right to presume that he may continue in his duties with reasonable safety until notice is given, we think the giving of signals is more than a detail. We are of the opinion rather that it is a necessary incident to the work, and that the master should have anticipated that unless he established and had observed reasonable means of communicating the signals, the servant would be injured. When this is the case, there seems to be a breach of duty upon the part of the master which would make him liable.

But it is earnestly insisted that Wiles was aware of the system or lack of system and yet assumed the risks of the labor. Again we must say that this is a disputed fact. It is not clear that he was aware of the lack of system. It is just as probable that when he was sent into the bin, he looked to Bess to see that while he, Wiles, was shoveling the materials from the chute, no shifting of the trap door that would endanger his life would take place by Bess' order or knowledge. If so, it is immaterial whether the act was done by a fellow servant or an inferior.

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The judgment of the lower Court dismissing the suit is reversed and the cause is remanded for a new trial. Appellee will pay the costs of this Court.

N., C. & ST. L. RAILWAY v. T. S. READ.

Writ of certiorari denied by the Supreme Court.
(*Nashville*. December Term, 1913.)

1. **CARRIERS OF PASSENGERS. Mileage Book contract. Ejection of Passenger.**

A provision of a railroad mileage book requiring the holder to procure a ticket from the ticket agent at place of inception of journey unless it be at stations where there is no agent and requiring the holder in such latter case to get off the train at the next junction or car-changing station and procure ticket for the remainder of the journey has no application to a passenger who mounts the train at a non-agency station with the intention of making a continuous journey to a distant point, although he is to pass through a junction station at which there is an agent, if the passenger is received as a passenger in a coach which goes the whole distance.

2. **SAME. Construction of contract. Explanations to conductor.**

Written or printed ticket is not always the contract between the parties; and it is the duty of conductors to listen to the reasonable explanations of passengers.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. T. E. MATTHEWS, Judge.

Railway v. Read.

FRANK SLEMMONS and CLAUDE WALLER for Plaintiff
in Error.

NORMAN FARRELL, JR., for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS action was instituted to recover damages from the railroad company for the alleged unlawful ejection of plaintiff from one of its cars while he was a passenger, returning home from Timberlake to Nashville. There was a trial of the cause before a jury, which returned a verdict in favor of the plaintiff for \$500 damages, after which defendant moved for a new trial, and among other grounds alleged the verdict was excessive. At the hearing of the motion, the trial Judge sustained the motion, in so far as it sought a new trial because of the excessiveness of the verdict, but suggested to the plaintiff that if he would remit \$250 of the verdict, the motion for a new trial would be overruled. The plaintiff, under protest, remitted the amount suggested, when defendant's motion for a new trial was overruled, and both parties have appealed to this Court and assigned errors. The railroad company has assigned a number of errors, its main contention, however, being that there is no evidence to support the verdict of the jury, and that its motion for a directed verdict should have been sustained. There are other assignments going to the charge of the trial Judge, and his failure to give the jury certain special requests, but these will be passed upon in the latter part of this opinion.

It appears from the evidence that plaintiff has an interest in and travel for the Read Phosphate Company, a manufacturing concern located in Nashville. He has traveled for this company since 1898, and during that time has bought and used a great many mileage tickets. His busi-

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ness for the company often calls him to West Tennessee, and in going to that section of the State he travels over defendant's line of railroad from Nashville, and over it in different parts of West Tennessee. He had often passed Hollow Rock Junction, which is a point where defendant's line of road from Nashville to Hickman, Kentucky, crosses its line of road from Memphis to Paducah, Kentucky. Between Hollow Rock Junction and Memphis there is a little flag station called Timberlake, at which trains only stop when flagged by persons intending to board them. Timberlake is not an agency station—that is, the company keeps no agent at this place for the sale of tickets to passengers intending to travel on its trains; and when such passenger gets aboard the cars thereat, if he has no thousand-mile ticket, he pays his fare to the conductor.

On the 2d of February, 1910, plaintiff bought from the defendant company a thousand-mile ticket, for which he paid \$25. This ticket is called by some of the witnesses, mileage, and has a printed agreement on it, and in it, certain rules and regulations, as well as instructions to the company's agents and conductors. On the back of the ticket, under the caption, "Notice—Important," is printed the following: "Mileage tickets will not be honored for passage on trains nor in checking baggage (except from non-agency stations, and agency stations not open for the sale of tickets), but must be presented at a ticket office, and there exchanged for continuous passage ticket, which continuous passage ticket will be honored in checking baggage, and for passage when presented in connection with this mileage ticket." On the back of the mileage ticket, under the head, "Instructions to Agents and Conductors," is also the following printed matter: "Coupons from this ticket will be used for passage only when presented by passengers boarding trains at a non-agency station, or agency

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stations not open for the sale of tickets. When so presented, passenger should be required to sign name on back of mileage strip to be detached for trip. The number of coupons required for trip should be added (on back of strip to be detached), to the lowest numbered mile on strip and coupons up to, but not including the total number which the addition gives should be detached. The names or numbers of stations, between which passenger travels, should be endorsed on back of strip detached." Printed on the face of the ticket, under the heading in capital letters, "REGULATIONS," is the following: "Coupons from this ticket will not be honored on trains or steamers, nor in checking baggage (except from non-agency stations and agency stations not open for the sale of tickets), but must be presented at ticket office and there exchanged for continous passage ticket, which continuous passage ticket will be honored in checking baggage and for passage when presented in connection with this mileage ticket. This ticket is subject to the exceptions, rules and regulations of each line over which it reads, with which exceptions, rules and regulations, purchaser hereof must acquaint himself." Under the heading of "Non-modification of Terms," on the face of the ticket, is the following: "No agent or employe of any line has power to alter, modify or waive any condition of this contract, or any stipulation printed hereon." With this mileage ticket in his possession, the plaintiff, on the 10th of March, 1910, left Nashville and went to the little village of Timberlake, on defendant's line of road, where he remained transacting some business until about 4.30 o'clock in the afternoon. When defendant's train was seen coming from Memphis going to Paducah, Kentucky, it was flagged for plaintiff, who desired to get on it and return to Nashville that afternoon. He bought no ticket at Timberlake, and did not exchange a

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mileage coupon from Timberlake to Nashville for a ticket between these points, because, as we have stated, there was no ticket agent at that point. He had this mileage book, however, intending to ride on it from Timberlake to Nashville. When the train stopped at Timberlake, and as he was getting on the cars, the flagman asked him his destination, when he replied, he was going to Nashville. The flagman then directed him to get on the Nashville car, being one in the rear, and this he did. In this connection it is proper to say, that when the train from Memphis to Paducah reaches Hollow Rock Junction, it there forms a junction with the train which comes from Hickman, Kentucky, to Nashville. The train from Memphis to Paducah hauls a Nashville coach, and when this train leaves the Junction, this coach is detached from the train for Paducah, left on the sidetrack at that point, and is then taken up and attached to the rear of the train from Hickman to Nashville, and hauled by it from Hollow Rock Junction to Nashville. After plaintiff went in the Nashville car, at Timberlake, as directed by the flagman, he took his seat, and shortly thereafter was approached by the conductor for his ticket. Plaintiff had no ticket, but had the mileage book we have mentioned, and as to what was said when the conductor came for his fare, we will allow plaintiff to make his own statement.

. . . From all of this, it appears that the plaintiff, after he got on at Timberlake, handed the conductor of the train his mileage book, and the conductor detached mileage to Hollow Rock Junction without objections on the part of the plaintiff. This train reached the Junction, was sidetracked, and waited some time for the train from Hickman to Nashville, during which time, he sat in the car reading a book, and made no effort to get a ticket from that point to Nashville. After the train left

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the Junction, and when about halfway to Camden, the conductor of that train called on plaintiff for his ticket, when he presented to him the same mileage book, and when the conductor told him he ought to have gotten off the train at Hollow Rock Junction and bought a ticket from there to Nashville. In reply to this statement plaintiff said, "Take this ticket or take nothing. You have got no right to put me off, or require me to pay this." So far as plaintiff's testimony is concerned, the conductor had not said one word about putting him off, but after he was told to take the mileage or nothing, he went away, and the train ran several miles, and as they were getting to Camden, the conductor came to him and requested him to get off at that point and get a ticket, telling him he would hold the train for him. When it stopped at Camden, the conductor again went to plaintiff and told him to get off and get the ticket, and said he would hold the train for him, but he did not do this, and wanted the conductor to get off and buy him the ticket; but the latter did not do so, and went out and again came back to the passenger, when the plaintiff again refused to pay the fare or get off the train at Camden and buy a ticket. Then it was the plaintiff said to him: "I won't be roughly handled; you will have to put me off," and so far as his testimony goes to show, the conductor had never said anything about putting plaintiff off until after they reached Camden, and he had refused to get off and buy a ticket to Nashville. Then for the first time, according to the plaintiff's own version of this affair, the conductor told him he must get off. Plaintiff warned him that he would not be roughly handled, and also warned him that he would not get off until the conductor put his hands upon him. After receiving these two warnings, the conductor placed his hands upon the old man, escorted him from his seat,

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picked up his baggage, and they walked out of the train together. There was no rudeness or insulting, rough, harsh language used, and, in fact, according to his own statement, it was an occurrence between two gentlemen, one insisting upon one proposition and the other upon a different proposition. There is not a line of evidence given by the plaintiff, that indicates that this conductor deserves, in any manner, to be called "a pig-headed conductor," as he is characterized in counsel's brief. It appears that the conversation between them was carried on in an undertone, so much so that a gentleman sitting across the aisle was unable to hear all that was said. No indignity of any character or kind was offered the old man, and it is evident to the mind of the writer that he thought he knew his rights, and was determined to stand upon them, and if ejected, bring suit against the company for it. The first conversation detailed by him, indicates his purpose to bring a suit if he was ejected by the conductor. That, it is apparent, was the thing uppermost in his mind when first approached by the last conductor for his fare. His statements in these conversations indicate that he was not sure but he ought to have gotten a ticket at Hollow Rock Junction, and that as he had not done so, he would insist upon his right to ride upon this mileage ticket.

Now, the question for our determination first is, did he have the right to ride from Hollow Rock Junction to Nashville on this mileage ticket; or, not having procured a ticket at the Junction, had the conductor the right to eject him from the train at Camden, because he had no such ticket and refused to pay his fare. The contract between them does not expressly provide for a case of this kind, but we think by implication the case is covered and embraced within the contract. It appears that after

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these tickets are sold, the holder has no right to board a train at an agency station and use one of them in payment of his fare to his destination; but it is made his duty to go to the agent and exchange mileage for a ticket from that point to the point of destination. After doing this, he may then have his baggage checked. When, however, the holder of such ticket desires to take passage at a non-agency station, the contract makes a different provision. Under it, after he gets on the train, he presents his mileage book to the conductor, who detaches from it mileage coupons covering the entire trip. That the plaintiff had the right to ride from Timberlake to Nashville on this mileage, without procuring a ticket at the next agency station the train reaches, we think there is no doubt. The conditions on the face of the ticket, and printed on its back, does not require the holder of a ticket, who gets on a train at a non-agency station, to get off of it at the first agency station reached thereafter, and buy a ticket for the remainder of his trip. We think the clear implication from the conditions or provisions printed in and upon this mileage, entitle the holder to ride from the non-agency station to the point of his destination, without getting off at the first station, or any other station, and exchanging mileage for a ticket to the end of his journey. Under the head of "instructions to agents and conductors," the latter is directed to require the passenger to sign on the back of the mileage strip detached, his name for the entire trip. Again, the conductor is required to endorse on the back of the strip or mileage detached, "the name or names of stations between which the passenger travels," thus clearly indicating that no matter how many stations he passes before reaching the end of his trip, he can use this mileage between the two points, and it is the conductor's duty to show on the mileage detached, the stations by which it has been used.

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It is insisted by learned counsel for appellant that when the train reached Hollow Rock Junction, it was then the duty of the passenger to get off and exchange his mileage for a ticket from that point to Nashville; while appellee's learned counsel insists that no such duty rested upon him. The plaintiff testified that he was not advised by the first conductor that he must make such exchange, and did not know that he was required to do so. There is certainly nothing on the ticket itself to indicate to the passenger that he should make the exchange at Hollow Rock Junction. The only argument in favor of this contention is, that the first conductor pulled the mileage to Hollow Rock Junction, thus indicating to the passenger that he should get off there and exchange mileage for a ticket. We do not think this action of the conductor sufficient to give the passenger notice. We do think, however, that it was the duty of the first conductor to have pulled plaintiff's mileage from Timberlake to Nashville, and then to have given him some check or other token indicating that he had boarded the train at Timberlake, a non-agency station, and was entitled to ride on his mileage from there to Nashville. If plaintiff, when he got on the train at Timberlake, had presented a ticket from that point to Nashville, the conductor would have taken up the ticket and checked him through to Nashville, and that is what he should have done in this case. This, the first conductor failed to do, and in fact failed to give the plaintiff any directions or instructions as to what he should do. The predicament plaintiff found himself in, when the second conductor approached him, was due entirely to the fault of the first conductor.

It is insisted by learned counsel for appellant that the second conductor could recognize nothing the plaintiff said about getting on at Timberlake, unless he had a check or

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some token from the first conductor showing that he had, in fact, gotten on at a non-agency station. We do not agree with learned counsel in this contention, and are of the opinion that under the case of *O'Rourke v. Street Railway Company*, 19 Pickle, 130, it was competent for the plaintiff to state at what station he got on, and that it was not necessary to show any ticket, or check, or anything else than his mere statement of that fact. In the case cited, the transfer ticket exhibited by the passenger contradicted the statement of the passenger himself; but the Supreme Court held that his statement was sufficient to entitle him to ride on the street car, and his ejectment thereafter was unlawful and unwarranted. If that is a correct holding, then there is no question in this case, but the conductor had no right to eject the plaintiff, after he had fully explained to him that he boarded the train at a non-agency station, where he had no opportunity to secure a ticket for his journey. But it is insisted that under the rule laid down by the Supreme Court in the case of *Railroad Company v. Flemming*, 14 Lea, 128, that no matter what explanation the passenger made, or how strongly he urged the truth of his statement, still the conductor had the right, and it was his duty to eject the passenger if he failed to pay fare from Hollow Rock Junction to Nashville. The facts of the *Flemming* case are quite different from those developed in this record. In the *Flemming* case the old negro man was in the car without anything whatever to show that he had a right to be there. He neither had money nor ticket, so far as he could show to the conductor. While it developed later that he did have a ticket on his person, he was unable to exhibit it to the conductor when it was demanded, nor could the conductor find it on his person, nor in the car, after such search as he was able to make. In this case,

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however, the plaintiff had a ticket, for which he had paid, and was entitled to ride on it from Timberlake to Nashville, and this ticket he exhibited to the conductor, and explained to him that he got on the train at a non-agency station. This explanation was sufficient under the case of *O'Rourke v. Street Railway Company*, 19 Pickle, 140.

In *Railroad v. Christian*, 2 Higgins, 231, this Court held that because the passenger did not show, and explain to the conductor that he had exchanged his mileage for a ticket from Bristol to Morristown, when it was within his power to do so, the ejection of the passenger was justified; thus recognizing the rule that the passenger may make explanations to the conductor that will entitle him to the privilege of a passenger.

Learned counsel for appellant insists that under the authority of the case of *Perry v. A. C. L. R. R. Co.*, 70 S. E., 1122, and opinion delivered by the Supreme Court of Georgia, that the conductor's action in ejecting the plaintiff at Camden, was justified and authorized. We have not had access to this case, but from the excerpts found in brief, we think it an authority for the insistence of plaintiff's counsel. There is but little difference between the facts of the Georgia case and the one at bar. In the Georgia case, the passenger started to go to Boston on the defendant's railroad, between which point and the place where he got on the train, was a junction point called Thomasville. He told the conductor, when he presented his mileage book, to pull it to Thomasville, but in this case plaintiff gave no such instructions, but the conductor did pull it to Hollow Rock Junction. This case, however, recognizes the right of the passenger, where he gets on at a non-agency station, to ride on his mileage ticket to the point of his destination, for the learned Court says: "If a passenger gets on a train at an agency

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station, with one of these books and without a ticket, he may, upon paying the train fare to some non-agency station on the route, make the non-agency station an initial point of passage, and may from that point offer his mileage book for passage to his destination at any point upon the railroad company's line, and compel them to accept it in lieu of a ticket." Again, it is stated in one of the excerpts: "Although the plaintiff might originally have required the conductor to accept his mileage all the way from Brinson to Boston, yet, since instead of doing this, he asked the conductor to accept his mileage for transportation only to Thomasville," thus recognizing the right of the passenger, who gets on a train at a non-agency station with a mileage book, to ride thereon to the point of his destination. Instead of this authority supporting the appellant's contention, it supports the right of plaintiff, as insisted upon by his learned counsel.

We hold, for the foregoing reasons, that the motion for peremptory instructions, was correctly overruled, and that there is evidence to support the verdict in this case. We think that the foregoing also disposes of the errors assigned, because of the failure of the trial Judge to charge the request set out in the brief, and for these reasons will not take up in detail all these various requests, there being quite a number of them.

It is insisted that the Court erred in certain parts of his charge to the jury, wherein he instructed the jury that they might look to the immediate facts and circumstances attending the ejection, "whether excessive force was used or not," it being insisted that there was no force used by the conductor. Again, in the close of another paragraph, in which the trial Judge told the jury "he would not be entitled to recover further or additional damages caused by the conductor putting his hands upon him, unless such

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action was attended by harsh, or other aggravating circumstances." It is true that there was no proof that any force was used, or that any harsh, or aggravating circumstances attended this ejection, but we believe that these statements, in view of all the proof in this case, had no weight with the jury, and for these reasons think the error, if any, was harmless, and did not tend to increase the verdict of the jury.

For the reasons stated, the judgment of the lower Court is affirmed with costs.

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TENNIE M. VANDERBERG, ET AL., v. MATTIE M. MOLDER,
ET AL.

1. BILL FOR SALE OF LAND FOR DIVISION. *Practice. Adjudication by Chancellor.*

The Chancellor may himself determine whether a parcel of land is susceptible of partition in kind, in advance of the report of commissioners as provided by statute.

2. PARTITION OF LAND. *Partial division. Sale of portions.*

The court in which is pending a proceeding for the sale of land for division may, if practicable and in accordance with the wishes of one or more shareholders, order an allotment of a share or shares in kind and severalty and direct sale of the remainder, if this remainder is not susceptible of partition in kind.

3. SAME. *Burden of proof.*

The burden is upon those petitioning for a sale of lands for division to show the necessity of a sale or the impracticability of a partition in kind.

FROM SHELBY COUNTY.

Appealed from the Chancery Court of Shelby County.
Part 1. F. H. HEISKELL, Chancellor.

WARRINER & WARRINER for Complainants.

RANDOLPH & RANDOLPH for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

MRS. VANDERBERG, claiming to be the owner of a one-sixth undivided interest in a tract of land of 69 13-100

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acres lying in Shelby County, filed this bill for sale for division and alternately for a partition in kind. The defendants were the owners of the remaining five-sixths interest, excepting the husband of one of the defendants and the fathers and guardians of two sets of minor defendants. At the hearing the Chancellor declined to order a sale for division, but instead appointed commissioners to view the premises and make allotments in a way hereinafter to be pointed out. Upon the coming in of their report it was confirmed. To this decree complainants and the guardians of the minor defendants other than the child of Mrs. Molder excepted, appealed to this Court, and have assigned numerous errors. It is unnecessary for us to incur this opinion with the various steps in the cause and the various allegations of the pleadings. What we shall say will be sufficient to guide the lower Court in proceeding with the cause upon remand.

1. We shall first dispose of the contention of the appellants that the Chancellor was in error in deciding that Mrs. Molder was entitled to and was the owner of the Eastern portion of what we shall designate as the 69-acre tract. It may be here stated that it is undisputed in the record that the tract of land sought to be sold was and is owned in the following proportions: Complainants a one-sixth; the two Siphers children a one-sixth; the three Shaw children a one-sixth; Mrs. Molder a one-sixth in fee, and a life estate in a one-third, with the remainder to her minor child.

The Chancellor held that the Eastern portion of the 69-acre tract had been sold to Mary A. Marsh, the deviser of Mrs. Molder, and that this was not to be included in the land to be divided, leaving for division about 43 or 45 acres of land. It is urged by appellants that the Chancellor should have adjudged that the whole tract of 69 acres was subject to partition or sale for division, and that Mrs.

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Molder had never acquired title to this Eastern portion, which she claims to be 25 acres and a fraction over.

We shall not undertake at this stage to adjudge the number of acres in this portion. Recurring to the question under consideration, we state that we have reached the conclusion that the Chancellor was correct in holding that there had been a sale of the Eastern portion of this 69-acre tract, and that Mrs. Molder and child were entitled thereto. Without elaboration we state that we base our holding upon the record evidence that a sale was had immediately after the allotment of dower to Fannie Marsh, the widow of the Marsh through whom they all claim, and upon the further ground that the parties through whom Mrs. Molder claims had possession for more than seven years, and in fact for about twenty years.

2. The matter next in importance to be passed upon is as to whether there can be a partial partition of a tract of land. The Chancellor in appointing commissioners instructed them if practicable to allot to the respective owners their shares in kind and severally, and that if they could not do this, then they should allot to Mrs. Molder and child one-half of the tract in kind, and then determine whether the remainder was susceptible of partition in kind among the other owners, and if not, to report as to the advisability of a sale for division. The commissioners apportioned to Mrs. Molder and child (the guardian *ad litem* of the child asking that its share be allotted and held in common with that of the mother) what they deemed to be one-half of the tract taking into consideration the value of certain improvements upon the Western half. They reported that after thus allotting the one-half to Mrs. Molder and child, the remainder of the tract was not susceptible of partition, and recommended a sale for division.

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It is said in criticism of the whole proceeding that the Chancellor in the first place usurped the functions of the commissioners when he adjudged that they must preserve to Mrs. Molder and child their one-half in common. It is said that the commissioners should have been permitted to view the premises and make up their minds as to whether the land was susceptible of partition and make report accordingly, and that the Chancellor could not in advance adjudge that there could be a partition of some kind. We are of opinion that this criticism is not well founded. The question as to whether there should be a partition in kind or a sale for partition is a judicial one, to be determined in any mode consistent with judicial procedure. 30 Cyc., 271. If it was apparent to the chancellor from the proof that a sale was unnecessary, and that some sort of division in kind could be made, it was proper, or at least not error, for him so to adjudge in advance of the appointment of commissioners.

The real and serious point of criticism is that the Chancellor should not have adjudged that there could be an allotment of a portion of the land in kind to two shareholders and a sale of the remainder. It is said that no such procedure is known to the law. It is urged that no one shareholder can insist upon having his portion allotted to him and force the others to a sale. After carefully considering this question, we have reached the conclusion that this mode of procedure is allowable in this State. We think it authorized, or at least not in contravention of the provisions of the Code on the subject of partition. It was held at an early date that such procedure was not authorized: *Robertson v. Robertson*, 2 Swan, 189; but soon after the rendition of this opinion the Code of 1858 was drafted, one of the sections of which, 5048, is to the effect that if the commissioners

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report that a part of the premises cannot be allotted in kind and severally, the Court may order a sale of that portion. The question has not to our knowledge been raised since the adoption of our Code; but we understand that the practice of so doing has been prevalent in some portions of the State for a number of years. We see no reason why this procedure cannot be approved and followed whenever and wherever it will not work injustice. This method of division and partition has been followed in a number of States: *Haywood v. Judson*, 4 Barbour, 229; *Gorman v. Campbell*, 135 S. W., 177; 30 Cyc., 240 and 261; Freeman on Co-tenancy, 2nd Ed., 543.

Anglo-Saxon people, especially the women, are lovers of land and home, and have an innate aversion to a sale of lands. It is nothing but right that their wishes in this respect should be observed and that a sale be the last resort. Sales for division are not the rule; they are the exception. The party who insists upon the sale for division must show the necessity therefor: *Reeves v. Reeves*, 11 Heiskell, 647. In order to justify a decree for sale over the protest of a single shareholder, it must be clearly shown that a sale is not practical or is more advantageous to all the parties than a division in kind; *idem*. That has not been done in the instant case with respect to the whole tract. But however this may be, the proof is overwhelming that the tract can be divided so as to allot Mrs. Molder and child their portions without detriment to the remainder, and the decree of the Chancellor so adjudging is approved by us. : :

It is said by learned counsel for appellees that the proof demonstrates that there should not have been any order of sale at all, and that the portions going to the Siphers and Shaw children should have been allotted to them. As a matter of fact, complainant is entitled to the enjoy-

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ment of her portion in kind if possible and practicable. It is the duty of the Court to see that the best possible arrangement is made for the minors. We shall not undertake at this stage of the case to adjudge that a sale should not have been ordered, for the reason that a re-survey and another partition are to be directed by us, and the Chancellor shall then pass upon the question as to what is best for the minor defendants. It may be that upon a re-survey to be ordered, more land for division will be shown. This may demonstrate that the tract is susceptible to partition in such a way as to allot to each of the six shareholders a one-sixth, excepting, of course, the one-half to be allotted to Mrs. Molder and child. It may be well in this connection to dispose of the contention made by the appellants that the eastern portion claimed by Mrs. Molder will not survey out 25.36 acres as claimed by her, and this will be demonstrated upon a re-survey in accordance with the original plats. The argument in support of this contention is so persuasive as to induce us to ascertain exactly that portion cut off. It may develop that some seven or eight acres will be added to the 45 acres for division; this may have the effect of changing entirely the allotments.

3. It is next urged that the Chancellor committed error in substituting another survey for the one originally named by him. We do not know why this substitution was made, but we are bound to presume in the absence of a showing otherwise that there was some justification for it.

4. It is finally insisted that the Court was in error in declining to retax the costs, particularly the costs of the surveyor, and also an item of \$6.00 charged up by the commissioners for automobile hire. While the surveyor's fee appears to be high, there is nothing in the record to

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show that it is excessive. With respect to the automobile hire, we feel constrained to overrule the objection. Costs are statutory, it is true. There is no specific provision for this item in our statute. But the expenses of commissioners so far as the item of travel is concerned are included in the provisions for costs. While this is an unusual allowance from the viewpoint of former times, we are of opinion that the statute authorizing the awarding of expenses to commissioners is flexible enough to admit of the using by the commissioners of reasonably expeditious, convenient, up-to-date modes of travel such as an automobile affords. There is no proof that the automobile charge is excessive.

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ROBERT F. JOHNSON, ET AL., v. NELLIE JOHNSON, ET AL.

Writ of certiorari denied by the Supreme Court.

(*Jackson*. April Term, 1914.)

1. WILL, CONSTRUCTION. *When creates a determinable fee.*

A will gave to testator's son certain lands set out and described "during his natural life," but stipulated that should the son "die childless, then and in that event, the lands above described shall revert to and become the property of my legal heirs then living." The son had an only child which, without issue, predeceased him. The devisee died leaving a widow. *Held:*

- (1) That at common law the estate passing to the son as devisee would have been an estate tail; but
- (2) Under the provisions of Shannon's Code, section 3673, this estate was converted into an estate in fee in the son, but under the terms of the will the fee terminated on the son's dying childless; so it became a determinable fee.
- (3) Had the son died leaving children or issue, they would have taken, not under the will, but as his heirs; but,
- (4) The son having died leaving no children or issue, the fee in him terminated and became vested in his father's heirs at law.
- (5) The rule that if there is an immediate gift to A, and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take only in the event of A's death before the testator, can have no application here, because (a) the gift to the son was, according to the express language of the will, in the first instance limited to a life estate, and not absolute and without limitation; and (b) the death of the son is not referred to in the will as an uncertain event, the uncertainty referred to being as to his leaving issue or otherwise at his death.

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2. **DOWER.** *Allowable out of lands held by deceased husband in fee determinable on his dying without issue.*

In Tennessee the common law governing dower so far prevails that the wife is dowable out of lands of which her husband was seized and possessed at the time of his death, his title to which was a determinable fee, where the fee terminated on the contingency of his dying without issue.

FROM HAYWOOD COUNTY.

'Appealed from the Chancery Court of Haywood County. C. P. MCKINNEY, Chancellor.

BOND & BOND, for Complainant.

A. C. ESTES, for Defendant, Nellie Johnson.

MR. JUSTICE HUGHES delivered the opinion of the Court.

COMPLAINANTS, some of the heirs at law of one Henry Johnson, deceased, filed the original bill in this cause for the purpose of bringing to sale for partition certain lands set out and described. One of the defendants, Mrs. Nellie Johnson, widow of one Lewis Henry Johnson, a son of Henry Johnson, deceased, by her answer seeks to assert dower in the lands, alleging that her husband, under the will of his father, was vested at the time of his, the son's, death with such an interest in the lands as gives her dower. This right is disputed by complainants and the other heirs at law of Henry Johnson, deceased, the co-defendants of Nellie Johnson; and the sole question for decision is whether or not she is entitled to dower in the lands sought to be sold for partition.

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The facts giving rise to the contentions of the opposing parties, and necessary to be stated in order to dispose of this question, are these: Henry Johnson died in 1874, leaving a will bearing date the same year. One of the clauses of that will is as follows:

"To my son, Lewis Henry Johnson, I give and bequeath, during his natural life, the tract of land I purchased of Asa Mann, in 1867, and on which he lived formerly for several years, containing 250 acres, more or less. I still further give and bequeath to him during his natural life that portion of my original tract of land lying due west of and adjoining the above described tract of land and bought of Asa Mann to be laid off by commissioners"; followed by a description of the two tracts, in which it is stated that the two combined contain about four hundred acres; and following that description the will proceeds: "But should my son, Lewis H. Johnson, die childless, then and in that event, the land above described shall revert to and become the property of my legal heirs then living."

Lewis Henry Johnson survived his father, and died in April, 1913. He had been married three times, and to him and his second wife, about 1896, there was born a living child, but which died in a few hours. The second wife died about 1898, and thereafter he was married to defendant, Mrs. Nellie Johnson, who survives him. No other children were ever born to Lewis Henry Johnson, so that at the time of his death he left no children, child or descendants.

The complainants, and the defendants other than Mrs. Nellie Johnson, are the descendants and heirs at law of Henry Johnson, deceased, and the husbands of those heirs at law who are married women; and it is their contention that Lewis Henry Johnson having died without

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surviving children or descendants, the lands passed to them under the provisions of the will of Henry Johnson, deceased, just set out, free from any interest of defendant, Nellie Johnson, therein. On the other hand, counsel for her insist, first, that the lands in question became, under the circumstances, the absolute property of Lewis Henry Johnson; and, second, that if they did not become his absolutely, he became vested with a determinable fee therein; and that, in either event, his widow is entitled to dower in them. In support of the proposition that Lewis Henry Johnson became vested with an unqualified fee in the lands, counsel rely first on the case of *Nott v. Fitzgibbon*, 23 Pickle, 54; and, second, on a doctrine announced and applied in *Cater v. Vaughn*, 1 Pickle, 302; *Meacham v. Graham*, 14 Pickle, 190; *Katzenberger v. Weaver*, 2 Cates, 620; and *Frank v. Frank*, 12 Cates, 569; and we do not find the *Nott-Fitzgibbon* case very much in point, so much so that we deem it proper to make extended reference to and quotations from it. The will of Edward Fitzgibbon, the construction of which was involved in that case, contained the following provisions:

"I hereby will my home place of seventy (70) acres, and seventy acres on the west and adjoining, and seventy acres still west, to my wife, Honora Fitzgibbon, and my son, James Fitzgibbon, jointly for life.

"In case my son, James Fitzgibbon, died without issue, or my wife should die, I hereby will and bequeath the homestead and the next seventy acres to Mrs. Margaret Nott and her four daughters for life, and with remainder to her heirs."

In the construction of these clauses of that will, made after the death of testator's widow, the Chancellor held:

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“(1) That it was the intention of the testator, Edward Fitzgibbon, to give his son, James Fitzgibbon, in case he survived his mother, Honora Fitzgibbon, a life estate in the 210 acres composed of the three seventy-acre tracts.

“(2) That the testator intended that if James Fitzgibbon died having issue surviving him, such issue should take the fee in said 210 acres.

“(3) That the testator also intended that in case the said James Fitzgibbon should die without issue surviving him, that Mrs. Margaret Nott and her four daughters should take a life estate in the seventy acres known as the homestead, and the next seventy acres west of said homestead, with remainder to their heirs in fee.”

With reference to such construction of the will by the Chancellor, and also with reference to its true construction, it was said by our Supreme Court:

“In part we agree and in part disagree with this construction. We agree with the Chancellor in holding that the testator devised to his wife, Honora, and to his son, an estate for their joint lives, and during the life of the survivor, the three tracts above described, but we do not concur with him in his conclusion, ‘that the testator intended that if James Fitzgibbon died leaving issue surviving him, such issue would take the fee in said two hundred and ten acres.’

“This conclusion can be based alone on the ground that an estate by implication is created in the issue of James; for it is apparent that there are no express words in the will creating an estate in any portion of the tract in such issue. In the case of *Machell v. Weiding*, 8 Sim., 4, ‘the testator gave real and personal estate to his wife for life, and after her death to her son, James, for life, but if his son should die without issue, not having any children, then his estate to be sold and the money divided among his other children.’

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“In construing this clause, with the view of determining the character of the estate which the son of the testator took, Sir L. Shadwill, V. C., observed, ‘that it was perfectly manifest that the testator did not intend the estate to go over so long as any issue of the first taker were in existence; and I consider it,’ he said, ‘to be a settled point that, whether an estate be given in fee or for life, or generally without any particular limit as to duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail.’ In discussing this and other cases, Mr. Jarman, in his very learned and exhaustive work on Wills, in his second volume, star page 139 (page 556), says: ‘It is to be observed that where the person on whose general failure of issue a devise is expressly made expectant, is the heir at law of the testator, he becomes by the application of the rule under consideration tenant in tail by implication in precisely the same manner as if there had been a prior devise to him and his heirs in the will.’

“In the case just referred to and in the rule thus announced by the author, if they are controlling, we have the key to the construction of the clause now being considered. For in this we have the testator devising to ‘his heirs at law’ for the term of his life (he having survived his mother, who is now dead), with a limitation over if ‘he die without issue’—which, under section 3675 of the Shannon’s Code, means issue ‘living at the time of his death or born to him within ten months thereafter.’ As no intention otherwise is ‘expressly and plainly declared in the will creating it,’ this estate tail, under section 3673 of the (Shannon’s) Code, would be converted into an estate in fee in the son, James, and his issue would take, not under the will, but as his heirs.

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"This estate in fee, however, would be determinable or conditional upon his dying without issue, in which event, and only in such event, will the limitation over, in favor of Mrs. Nott and her four daughters for life, with remainder to their heirs take effect.

"But we have a line of cases in this State settling this question without resorting to the rule laid down by Mr. Jarman, and yet which bring about the same result. In *Petty v. Moore*, 5 Sneed, 126, the testator devised and bequeathed his real and personal estate to his wife for life with remainder over to his eleven children. By a codicil to his will, among other provisions, was the following: 'I do will and declare, if any of my eleven children shall die without an heir of their body, that all of the property that shall ever descend to them from me shall return and be equally divided among the remainder of my heirs that shall be living.' One of these children died after the decease of the testator, but before the life estate ended, leaving children, and the question was, Did his share of the testator's estate vest in his children under the clause of the codicil, or 'did it pass in the ordinary course of descent to his representatives, real and personal'?

"The insistence for the children was that they took under the codicil 'by implication of law,' but it was held otherwise. This Court said: 'It is clear that by the previous provisions in the body of the will the eleven children of the testator took, severally, a permanent interest in the remainder, and it is equally clear that by the codicil each one of the children named therein was vested with an immediate, absolute interest, subject to the possibility of its being divested in a future contingency—that is, upon the death of either without child.'

"This rule was afterwards, in *Owen v. Hancock*, 1 Head, 562, applied to the taker of a life estate. The

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provision in the will then construed was as follows: 'I give to my daughter, Mary Cooper, a negro girl, Celia, during her lifetime, and if she should die without any heirs of her body, the said negro girl and her increase to return to my estate and be equally divided among the rest of my children.' The Court said: 'Here is a disposition of slaves to his daughter for life, and no express disposition over except in one event, that she should die without 'heirs of her body,' and in that event to go to his, the testator's, other children. This contingency did not happen, for she died in 1853, leaving three children. It cannot, then, return to his estate, and the question is, where does it go, when the event upon which it was to go over made the will, however, impossible?

"In the will of Amistead Moore there was a clause very similar to this, which we construed at the last term (5 Sneed, 127), as we now do this. Perhaps the only difference is, that when the estate given was general, dependent upon the contingency of dying without heirs of the body, and here it was for life in terms. Can this make any difference in the construction? We think not; and so are the authorities. So the life estate, expressly given, was enlarged into a fee, upon the birth of a child.' The authority of these cases is in no way disturbed by *Turner v. Ivie*, 5 Heis., 222, and they are referred to approvingly in the later case of *Cowan, McClung & Co. v. Wells*, 5 Lea, 682, and the rule therein announced may well be regarded as one of property in this State.

"So that, the record disclosing that James, the son, is married and has had issue born to him, under this rule the estate for life devised to him in the homestead of seventy acres and the tract of seventy acres immediately west thereof, has been enlarged into a fee, determinable, however, upon his dying 'without issue' (*Petty v. Moore, supra*,

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and *Battle v. House*, 4 Lea, 202, and *Alston v. Davis*, 2 Head, 265), in which event the limitation over will take effect."

Here we have the express holding in the construction of a will with provisions so similar to those the construction of which are involved in the instant case that the holding in the one must be conclusive of the other, that holding being that under the common law the estate passing to the devisee would have been an estate tail, but that by virtue of our statutes that estate became a fee determinable upon the devisee dying without issue; and we have the further significant holding that if the devisee there should leave issue, such issue would not take under the will, but as heirs of the devisee. Applying the holding in that case, we think it clear that Lewis Henry Johnson, under the will of his father, became vested with a determinable fee to the lands here involved, and that had he died leaving children or issue they would have taken, not under the will, but as his heirs; but, having died leaving no children or issue, the fee in him terminated and became vested in the heirs at law of his father, Henry Johnson, deceased.

As to the contention that by virtue of the holdings in the cases of *Cater v. Vaughn*, *Meacham v. Graham*, *Katzenberger v. Weaver* and *Frank v. Frank*, *supra*, Lewis Henry Johnson became vested with a fee in the lands devised to him by his father, one answer is found in the holding in the case of *Nott v. Fitzgibbon*, *supra*, so freely quoted from. If the doctrine of those cases had been applicable there, and they would have been if applicable here, our Supreme Court could not have held that the devisee there took only a determinable fee. Another answer is, that in all the cases referred to where it was held that the death of the devisee without issue

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meant death in the lifetime of the testator, and in the many cases relied on as authorities for the holding in the case of *Meacham v. Graham*, the gift, as the Court remarks in that case, was "absolute and without limitation," while in the case at bar the gift to the son was, according to the express language of the will, in the first instance limited to a life estate. The fact that the fee is given in the first instance is repeatedly mentioned as being an important fact in the *Meacham-Graham* case; and a close reading of all of the cases applying the rule as to dying without issue having reference to the death of the devisee in the lifetime of the testator shows that the fact that the gifts were absolute and not of a mere life estate were material. In all of them the fact that the gifts were absolute is referred to as of controlling importance. Further, that the rule followed in the cases referred to, as it is set out in the case of *Frank v. Frank*, on page 575 of 12 Cates, when applied to the facts of the instant case, is not controlling, becomes apparent on close examination. The rule as there set out is, "If there is an immediate gift to A. and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in event of A's death before the testator.'

It will be seen that before the rule can apply the expression used must be such as to imply the death of the devisee as an uncertain contingency. We think that rule cannot apply in the case at bar because the reference in the will of Henry Johnson to the death of testator's son, Lewis Henry Johnson, is not, in our opinion, a reference to that death as a contingent event. The expression is, "should my son, Lewis H. Johnson, die childless, then and in that event, the land above described shall revert to and become the property of my legal heirs then living."

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The contingency or uncertainty here referred to is not of the son's dying, but of his leaving issue at the time of his death. This further appears from the provision that the property shall revert to and become the property of testator's legal heirs "*then living*"—that is, living at the time of the death of his son, whenever that might occur. The Katzenberger-Weaver case also shows by quotations from Jarman on Wills and Theobald on Wills that it is only where the death of the devisee is spoken of as an uncertain or contingent event that the rule as to death in the lifetime of the testator applies, and that the rule is applied only "*ex-necessitate rei*, from the absence of any other period to which the words can be referred." (12 Cates, 629–632). We think there is no room for its application to the will of Henry Johnson, deceased, and that his son, Lewis Henry Johnson, did not take an absolute fee, but only a determinable fee.

Now, reverting to the question of whether the determinable fee vested in the husband of Mrs. Nellie Johnson was such estate as that she became dowable in the lands, we do not find that that precise question has ever been passed on by our Supreme Court. We do find, however, quite a wealth of legal learning on the question. The question is discussed at length and learnedly in 1 Scribner on Dower (2d Ed.), Chapter 14. At page 313 of that volume the rule quoted approvingly from Coke on Littleton is that "in every case where a woman taketh a husband seized of such an estate of tenements, etc., so that by possibility it may happen that if the wife have any issue by her husband, and that the same issue may by possibility inherit the same tenements of such estate as the husband hath, as heir to her husband of such tenements, she would have her dower, and otherwise not." And throughout this chapter such is shown to be the un-

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doubted rule of the common law. This rule, it appears from Scribner and all the text authorities, giving the widow dower in an estate which would otherwise terminate at the death of her husband, is an exception to the general rule that an estate which terminates at the death of the husband will not support dower. This exception and the basis of it are well stated in the following language taken from 1 Scribner (2d Ed.), page 319:

"There seems to be a marked distinction between a case where, by the terms of the limitation, the husband takes a fee simple estate, which, if he had issue living at his death, will descend to such issue, and which is limited over only in the event of his death *without issue*, and other cases of conditional limitation. Such a case is closely assimilated, in principle, to the natural determination of the estate for the want of heirs generally, and there would seem to be no good reason why the husband's estate should not be so prolonged as to give the right of dower in the one case as well as in the other, particularly as it is allowed to estates tail under similar circumstances, and also to conditional fees at common law."

Another significant fact, and one that we think becomes controlling in the case at bar, is that, as shown by chapter 14 of Scribner, just quoted from, and beginning on page 297 of the first volume of the second edition of that work and extending to page 320, the same estate which will support dower will also support curtesy. In other words, the same character of estate vested in the wife which will give the husband curtesy will, if vested in the husband, give the wife dower. This fact frequently appears in the pages of Scribner just referred to, the author constantly using cases where Courts had held husbands entitled to curtesy for the purpose of showing what character of estates will support dower.

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All the text authorities appear to be to the same effect as Scribner, both as to the fact that a determinable fee, such as that created by the will of Henry Johnson, deceased, in his son, Lewis Henry Johnson, is sufficient to give the devisee's widow dower, and that the estates of dower and curtesy depend on the same character of estate in the deceased husband or wife. In 1 Washburn on Real Property (5th Ed.), page 204, speaking of the character of estate that will support dower, it is said:

"The inheritance, moreover, must be such an one as the issue of the wife might by possibility take by descent. This relates to the question whether her issue could inherit, if she had any, and not to her physical capacity to bear children." And in treating of estates tail in the same volume, at page 113, it is said: "Dower and curtesy are also incidents of this as of estates in fee simple."

In 4 Kent's Com., star page 49, is found the following: "If the husband be seized during coverture of an estate subject to dower, the title will not be defeated by the determination of the estate by its natural limitation; for dower is an incident annexed to the limitation itself, so as to form an incidental part of the estate limited. It is a subsisting interest implied in the limitation of the estate. Thus, if the tenant in fee dies without heirs, by which means the lands escheats; or if the tenant in tail dies without heirs, whereby the inheritance reverts to the donor; or if the grantee of a rent in fee dies without heirs; yet, in all these cases, the widow's dower is preserved."

In Blackstone Com., Book 2, star page 131, it is said: "We will next to inquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seized in fee-simple or fee-tail, at any time during the coverture; and

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of which any issue, which she might have had, might by possibility have been heir. Therefore, if a man seized in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife." Much more should this rule apply in Tennessee, where all the children inherit the lands from the father, and where one son would not have to die in order that another son might inherit.

See also 14 Cyc., 880; and 10 Am. & Eng. Encyc. of Law (2d Ed.), 160.

It being settled that the same character of estate that will support curtesy will support dower, the case of *Crumley v. Deake*, 8 Bax., 361, becomes one of prime importance here. It was held in that case, to quote from the syllabus:

"A husband may be tenant by the curtesy where the estate of the wife was a conditional or determinable fee, although the condition has happened upon which the limitation over in favor of other parties takes effect."

The case in which this was held was one where a devise was to testator's three children with the provision that if either "should die without lawful issue of their body, the estate shall fall to the other two," and a determinable fee thus created was held to support the estate of curtesy. The significance of this holding is too apparent to require further comment, provided our statutes have not so changed the common law as to dower that the rules of the common law do not apply. The extent to which our statutes have changed the common law on this question will, therefore, be next considered.

By virtue of Acts 1784, chapter 22, the widow became dowable, in one-third part, of all the lands of which her husband dies seized and possessed, rather than of all the

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lands that he might have been so seized during coverture, as at common law; and, by later enactments, she is dowerable in lands of which her husband was equitable owner at the time of his death. Shannon's Code, sections 4139 and 4140. We think it clear that the only extent to which the common law was thus changed, in so far as the statutes abridge the right of the wife to dower, is to make the widow dowerable out of such lands as the husband dies seized and possessed of, rather than such as he might have owned during coverture. In other words, where, under our statutes, the husband dies seized and possessed of lands the rules of the common law must prevail in Tennessee. This is practically held in the case of *Combs v. Young*, 4 Year., 218. In that case it was said: "By the common law, if a husband acquired an estate, which was subject to descent to his heir, the wife, at the same time the husband acquired his title, had vested in her a right of dower." And later in the same opinion, in speaking of the effect of our statutory enactments, it is said: "The widow's right stands on the same foot it did previous to the passage of the Act of 1784, in reference to the lands of which the husband died seized."

This case of *Combs v. Young* also holds that our statutes are to be liberally construed in favor of the right to dower, and the same is expressly held in the case of *Tarpley v. Gannaway*, 2 Cold., 246.

Counsel for the heirs at law of Henry Johnson, deceased, cite and rely on 14 Cyc., 905, 906; 1 Scribner on Dower, 319; *Weller v. Weller*, 28 Barb., 588, and other authorities in support of the view that a determinable fee in the husband will not support dower in his widow. Taking 14 Cyc., 905, 906, alone, it would appear to so announce, but the only authority cited in support of the proposition is 1 Scribner on Dower, 289, and when that

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authority is looked to it is seen that the distinction is that when the estate of the husband is defeasible by any other even than that of his dying without issue, the widow is not dowable, but when the estate depends on his dying with or without issue it does attach. This is most clearly brought out on page 319 of 1 Scribner, and is the distinction that reconciles and makes harmonious the otherwise apparently conflicting text authorities. As to the case of *Weller v. Weller*, it is pointed out in a footnote in 1 Scribner, 318, 319, that in later holdings the Courts of New York have receded from the holding of that case.

But at last, our statutes having changed the common law only to the extent of requiring that the husband be seized at the time of his death in order that his widow have dower, and it being established that the same character of estate that will support curtesy will support dower, and it being settled in this State that the character of defeasible estate here involved will support curtesy, as we have seen, and giving a liberal construction of our statutes in favor of dower, we think it clear that Mrs. Nellie Johnson, the widow of Lewis Henry Johnson, became entitled to dower in the lands in question; and the decree of the Chancellor so holding is affirmed.

The appeal in this case was permitted, in the discretion of the Chancellor, before other questions were adjudged. The case is, therefore, remanded to be further proceeded with. The costs of this appeal will be paid by the heirs at law of Henry Johnson, deceased, who are parties complainant and defendant in this suit, it appearing that they were all interested in common against the widow of Lewis Henry Johnson, and she alone having appealed.

Oppenheimer v. Woolwine.

HENRY M. OPPENHEIMER v. L. M. WOOLWINE.

Writ of certiorari denied by the Supreme Court.
(*Jackson*. April Term, 1913.)

1. *LIVERY STABLES. Sales stables. Liability of owner for fraud and deceit of person in stable.*

A party who goes to a sales stable for the purpose of buying a horse from the owner and who finds a bookkeeper and agent in charge may hold the owner liable for fraud and deceit practiced in the sale of a horse by a third party in the presence of the bookkeeper and where the sale is made by direction of the bookkeeper, and where the purchaser is under the impression that he is dealing with the agent of the stable owner, although the horse in fact belongs to another man, who conducts the negotiations leading up to the sale, and although the stable is frequented by parties having horses for sale.

2. *AGENCY BY ESTOPPEL. Agency created by estoppel.*

And in such case the question is not whether there is any agency, but whether the conduct of the implicated principal was such as to justify the opposite party in believing and assuming that the person averred to be an agent had been clothed with the powers of an agent.

3. *SAME. Mercantile customer.*

A customer who goes to a mercantile house during selling hours has the right to assume that anyone left in charge is clothed with the powers of a salesman.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Division N. 4. H. M. McLAUGHLIN, Judge.

Oppenheimer v. Woolwine.

LEO GOODMAN for Plaintiff in Error.

R. I. MOORE for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THE bill of exceptions in this case is meager, but from it we gather the following: Plaintiff in error is the owner and keeper of what is designated as a sale, feed and commission stable in the city of Memphis. It is looked upon as a place where horses are boarded, or where they are sold or traded by customers, or where they are sold by the proprietor either as his own or on commission.

During business hours on the 16th of December, 1910, defendant in error, Woolwine, went to this place for the purpose of buying a horse. Upon entering he asked for Mr. Oppenheimer, but was informed by an agent, called a bookkeeper, that the proprietor was not in. Mr. Woolwine stated the purpose of his visit. He was told by this servant that if he would wait a minute one of the salesmen of the stables, "*our salesman*," would be called. A Mr. Blanchard came forward, and was informed by the bookkeeper that Mr. Woolwine desired to purchase—of them or of the stable—a horse. Woolwine and Blanchard began an inspection and examination of horses that were in the stalls. Finding one that apparently suited him, a trade was effected, the sum to be paid being \$155.00. They returned to the office of the building and reported the sale to the bookkeeper, who thereupon wrote out upon stationery of the stable and delivered to Woolwine a bill of sale. The original of this bill of sale is in the record, and is most significant in wording and appearance. It has in large letters at its head the name of plaintiff in error. On the next two lines are the words, "Wholesale and Retail Dealer

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in High Class Horses." Under the last three words, but in smaller type are the words, "Sale, Feed and Commission." In writing on this paper is a receipt for \$155.00 for a horse, described and warranted. It is signed by Blanchard—that is, Blanchard's name appears as the party who executed it. As a matter of fact, the bookkeeper signed the name of Blanchard thereto without knowledge of Woolwine. Blanchard was himself a customer of the stable.

Woolwine at the time he made this trade believed he was dealing with the agents of Oppenheimer. He went to the stable for the purpose of dealing with Oppenheimer only, as the latter was a well-known trader and stableman in the city of Memphis. We must infer from the testimony that this was the chief part of Oppenheimer's business, and that he held himself and his place of business out as a resort for all who desired to purchase or sell horses. In other words, he was in a sense a merchant, his stock in trade being horses. In fact, he advertised himself through his stationery and otherwise as such.

The testimony of Oppenheimer was to the effect that he knew nothing about the trade whatever, that Blanchard was not his agent, but was a dealer upon his own responsibility, and that the bookkeeper had no authority to negotiate a sale or to direct or constitute any other person his agent for the purpose of making sales.

We are of opinion that the trial Judge was warranted in holding that the employment of the bookkeeper was not limited to the extent asserted by Oppenheimer. It is fairly inferable that this agent, in the absence of Oppenheimer, had authority to wait upon all customers who called in the regular course of business. If he had this authority, there was no exceeding his power in calling another person about the stable to exhibit horses to the customer and discuss the terms of sale.

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The horse bought by Woolwine turned out to be unsound and practically worthless. Thereupon this suit was instituted. It was tried in the Circuit Court without the intervention of a jury. Woolwine recovered judgment. Oppenheimer has appealed, and assigns as error the awarding of any recovery to Woolwine.

We are urged to lay down a general rule for the governance of livery stable keepers. This we shall decline to do to the extent requested; but shall proceed, according to the spirit of the common law and pursuant to its genius for particular instances, to arrive at the justice of the situation presented to us by the record. It of course may be fairly inferred that like situations will be dealt with in like manner, as is usual in jurisdictions where the doctrine of judicial precedent obtains.

From time immemorial the common law rule has been that a dealer or trader having a fixed place for the carrying on of business is bound by the acts of any servant or agent who may be left in charge. For instance, a clerk or any person standing behind the counter of a store or in charge of merchandise for sale, binds the proprietor by all acts done in the usual way in furtherance of the business: *Elsner v. State*, 30 Texas, 524. Again, where the proprietor of a business establishment leaves a person in charge of an office or department, apparently clothing him with authority to transact the business of the firm, he will be bound by the acts of the party, although he goes beyond the scope of his authority. *Haner v. Furuya*, 39 Washn., 128. The proprietor of a business leaving the establishment open and in charge of one of his servants and going away for some time, is estopped to repudiate the act of the agent in dealing with customers who, finding the business place open, and having no knowledge of limita-

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tion of authority, deal with the one in charge as the representative of the owner. *Cowdry v. Vandenberg*, 101 U. S., 572.

In passing upon the ostensible scope of the authority of an agent, it is well to distinguish merchants and traders in their relations to the public from others. Business houses fronting streets are constant invitations to people to come in. It may be said that a commercial establishment is a proclamation that all who come within business hours will be greeted by someone clothed with the authority to wait upon all comers. Proprietors in large cities especially should be held as making these representations. If the owner leaves his agent in charge apparently clothed with authority to act, or if the customer, acting in the ordinary way may reasonably presume that the agent has authority, the proprietor is estopped to deny agency. 2 Street, 448, 453, 481. The question is, What has the principal *apparently* directed the agent to do? If the proprietor of a trading post, without shutting up shop, has left one in charge, customers should clearly have the right to presume that the custodian is clothed with authority to transact the usual business. *Cowdry v. Vandenberg, supra*.

Agency by estoppel is a well founded and beneficent doctrine, and it should be invoked to prevent injustice and to visit the consequences of a wrong or a mistake upon the party equitably responsible. It does not depend upon actual title or authority of the agent; it is to be asserted and founded upon such acts of the owner as will preclude him from denying agency. *McNeal v. Bank*, 49 N. Y., 325. The question is whether the principal has actively, actually or negligently allowed any person to assume a position or an authority which will induce others acting with reasonable prudence to believe that the actor is the agent of the principal. If so, there is ground for an estoppel. *Idem*.

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As was stated by Baron Pollock in *Reynell v. Lewis*, 15 Meeson & W., 527, agency in some instances may be created by act of the party other than the principal in treating him as having authority to act for the principal. The question then is, whether the party seeking to hold the principal liable was justified in assuming that the person who acted as agent had authority to bind the principal. If so, the principal is estopped. We find nothing in the quotations from 31 Cyc., 1235, copied in the behalf of learned counsel, at variance with the position here taken. It rather lends support. In conclusion upon this point, we do not think it a far stretch of juristic principles to apply the old doctrine of liability of dealers growing out of sales made by servants apparently in charge, to sales of horses in livery stables.

We are of opinion that the judgment of the lower Court should not be disturbed. It is in all things affirmed with costs.

Much stress is laid upon the fact that defendant conducted a feed and commission business, and that his signboards so proclaimed. This is not material or controlling. That part of his business which was brought most prominently before the public was that of selling horses of his own. Having held himself out as such a dealer and having left in charge of his business an employe who might within the apparent scope of his authority mislead customers who desired to buy, the proprietor should not be permitted in the absence of very clear proof, to escape the consequences of a fraud perpetrated in his place of business by a man who is as it were sheltered by his cloak, although this man in reality be a trader upon his own responsibility.

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GEORGE H. GLASCOCK, AGENT, v. JEFF B. MARMON.

Writ of certiorari denied by Supreme Court.

(*Jackson*. April Term, 1914.)

LANDLORD AND TENANT. *Holding over. Liability for rents.*

A tenant in possession under a written lease for one year who holds over without a new arrangement is presumed to elect to retain the premises for the succeeding year upon the same terms, and is liable for the whole of the next year's rent.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Division No. 4. H. W. LAUGHLIN, Judge.

McKELLAR & KYSER for Plaintiff in Error.

H. H. HONNELL for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS is an action to recover rents for the use of a house and lot in Memphis, belonging to the plaintiff, Mrs. Rhea. It was tried before Judge Laughlin without a jury, who found the matters in controversy in favor of the defendant, and rendered a judgment accordingly, dismissing the plaintiff's suit. The case was then brought to this Court by plaintiff's appeal, and it is insisted the Court erred in dismissing plaintiff's suit. On the hearing of the cause, the defendant requested the trial Judge to make a written findings of the facts and law of the case, and this he did, and

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the same is in the record. Appellant insists that upon the facts found, the trial Judge was in error in his conclusions of the law arising upon the facts so found. It appears from his findings that Mrs. Rhea rented to the defendant, beginning September 1, 1910, and ending September 1, 1911, her house and lot on Waldran Avenue, for the rental value of \$480, payable monthly at the rate of \$40 per month. On July 26, 1911, a little more than a month before this rental contract expired, plaintiff's agent, Mr. Glascock, wrote defendant to know if he wanted to renew the contract for the premises for another year. The defendant replied by saying he would take the house and lot for another year if certain repairs were made on it, naming them, and suggested to Mr. Glascock, if he wished to lease the premises, to see the defendant's wife, Mrs. Marmon. In the view we take of this case, it is not necessary to go into detail about the negotiations that passed between plaintiff's agent, Mr. Glascock, and the defendant about renting the place for another year; it is sufficient to say they failed to come to any agreement about it, but the defendant remained in possession of the property pending these negotiations. The final conversation between defendant and Mr. Glascock was had in Sol Coleman's cigar store, the date of which is not stated in the Circuit Judge's written findings of the facts. This conversation must have occurred about the 18th of September, 1911, or a day or two before this date. Nothing further was said about renting the place for another year, until on the 18th of September, when the defendant mailed to Mr. Glascock a check for \$40, with an indorsement on it as follows: "Rent for September, 1911." When Mr. Glascock received this check, he wrote the defendant stating he would hold it until he had signed the lease. Defendant did not reply to this letter, when, on the 28th of September, 1911, Mr. Glascock wrote and mailed to defendant the following letter:

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"September 28, 1911.

"MR. JEFF B. MARMON,

"244 S. Waldran St., City.

"DEAR SIR—Referring to our letter to you under date of September 19th, to which you have made no reply: We infer you do not care to sign a new lease as agreed upon between yourself and the writer. Since you have held over, and tendered your check for the September rent, which we have accepted, you understand, of course, that you are holding over under the terms and conditions of the old lease, and we, therefore, consider the matter closed with you for another year ending August 31, 1912, upon the same terms and conditions as recited in the lease between you and Mrs. I. G. Rhea, dated August 24, 1910, and covering premises known as No. 244 South Waldran Street, and expiring August 31, 1911.

"Yours truly,

"GEORGE H. GLASCOCK,

"Agent for Mrs. I. G. Rhea."

The defendant did not answer the above letter, but continued in possession of the property until about the 21st of December following, when he wrote Mr. Glascock informing him that he had vacated the house, sending him one of the keys and stating that he had left another key with a lady next door. After receiving this letter from the defendant, Mr. Glascock wrote him, on December 28, 1911, acknowledging receipt of his letter, and among other things said:

"We wish to advise that in vacating the premises you have done so at your own election and without the previous knowledge and consent of the owner or ourselves as agents. We shall, of course, hold you liable and responsible for the

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rent of the premises until August 31, 1912. If the rent of the premises is not paid into our offices on or before the 5th day of each month, beginning January 5, 1912, we will on that date, and on the 5th of each month thereafter, place the account against you for that month's rent in the hands of our attorneys for collection. Should opportunity present, and you decide you wish to do so, we will sub-rent the premises for your account, but we do not understand that you are in any way released from the rent of the premises on account of your having vacated same, and we take this means of notifying you to that effect.

"GEORGE H. GLASCOCK,

"Agent for Mrs. I. G. Rhea."

The plaintiff, nor her agent, Mr. Glascock, was able to find a tenant for the premises until after the 31st of August, 1912, and therefore bring this suit against the defendant to recover rents for the months of January, February, March, April, May, June, July, and August, upon the ground that the defendant having been notified on the 28th of September, 1911, that if he remained in possession of the property plaintiff would hold him for the rents under the old contract, until the 31st of August, 1912. The defendant paid the rents for the months of October, November, and December, and in each one of the checks given for these months rents, indorsed thereon that it was for rent for the premises on Waldran Avenue, for the particular month for which the payment was made. The amount of each check so given by defendant for these rents was \$40, that being the amount that defendant paid plaintiff for each month's occupation of the premises during the year preceding, and the amount fixed in the contract dated August 24, 1910, referred to in the letter of September 28, 1911.

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The plaintiff's learned counsel insists that when the letter of the 28th of September was sent to the defendant, stating that the defendant would be held liable under the old contract, that after he failed to make any reply to this letter, but continued in possession of the property and paid the rents according to the terms of the first written contract, he thereby impliedly agreed to the terms of that letter and became bound for the rents of the property until the 31st of August, 1912. It is proper in this connection to say that the defendant seems to have decided to hold the property for another year if certain improvements could be made on it, and some negotiations were had about these improvements and the rents to be charged. They substantially reached an understanding, but before an agreement was signed by defendant, he went to New York, and from that point wrote to Mr. Glascock that he would see him on his return, but failed to do so. They did not have any further conversation about the matter until they met in the cigar store, when some hot words passed between them. This, as stated, was about the 18th of September, and during all this time the defendant kept the possession of the property; and on the 18th of September paid the \$40 rent for the premises for that month. At no time during the negotiations, or conversations between Mr. Glascock and defendant, did the defendant indicate any willingness or intention of vacating the premises. He paid the September rents, inclosing a check for it in an envelope, without writing a line, saying whether he intended to vacate the property or remain in possession of it for another year. When Mr. Glascock wrote him on the 28th of September, the letter which we have copied, the defendant made no reply or giving no intimation that he intended to vacate the property and restore the possession to plaintiff, and not informing Mr. Glascock whether he intended to

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keep it for another year or not. The defendant paid the rents for October, November and December, and when making these payments, gave no indication, by letter or otherwise, that he intended to vacate the property, and plaintiff insists that after he received the letter of September 28th, he elected to keep it for another year under the terms of the former written contract, and to become bound for a year's rental at \$40 per month. Plaintiff further insists that his payment of rents for three months thereafter was an admission of his liability for the rents at the same rate until the 31st of August, 1912, as well as an admission that the former yearly contract had been renewed and continued in force until the latter date.

Plaintiff's learned counsel first insists that, inasmuch as there was a contract for the rent of the premises for one year, and inasmuch as the defendant held over about four months after the expiration of that year, the landlord, the plaintiff in this case, had a right to elect, and that she did elect to treat him as a tenant for another year, holding under and according to the terms of the original yearly contract, and he cites the case of *Shepherd and Mitchell v. Cummings*, 1 Cold., 354, as authority for this insistence. In that case, Mr. Justice Wright said: "Where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. . . . If they suffered the second year to commence without putting an end to the relation, Cummings was entitled to the whole year's rents, and the plaintiffs in error, as his tenants, could not determine the estate in the middle of the year. If this could be done, the landlord might lose his rent altogether, at least, for a good part of the year. Having entered upon the premises for the second year, Cummings had a right to expect that they would continue to hold,

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and pay rent for the entire year, and they cannot be allowed, capriciously, to disappoint his expectations." It will be observed that Mr. Justice Wright says: "If they (meaning the tenant) suffered the second year to commence without putting an end to the relation (meaning the relation of landlord and tenant), Cummings was entitled to the whole year's rents." This language indicates that in order to defeat the landlord's rights to rents for the whole year, the relation of landlord and tenant must be ended before the second year commences, and if it had not, the landlord was then entitled to another year's rent. Again, the learned Justice says, having entered upon the premises for the second year, just as defendant did in this case, Cummings had a right to expect that they would continue to hold and pay rent for the entire year. The defendant having entered upon another year, or continued in possession of the premises after the expiration of his yearly contract, the plaintiff had a right to expect that he would continue to hold and pay rents for the entire year.

It is said, however, that plaintiff had no right to expect defendant to pay rents for the entire year, for the reason that he had refused to rent the premises unless certain repairs were made. This record fails to show that defendant, at any time, refused outright, to continue the rental contract for another year unless his demands for repairs were acceded to. He seems to have wanted the repairs made, and at one time expressed a willingness to pay part of their costs, and the only thing he declined to do was to pay an increased rent of \$5 per month. This he refused to do. It is worthy of note that he never refused to keep the house for another year at \$40 per month, and it is also important to observe that he continued to remain in possession of it, never indicating

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an intention to vacate, until after he had done so in the latter part of December.

In the case of *Hibbard v. Newman*, 2 Bax., 284, the Supreme Court held to be a correct statement of the law the following charge of the trial Judge to the jury: "That if defendants hold over after the expiration of the first year, they would be bound for the second year's rents—the whole of it. That to relieve them from this liability, the defendants would have to prove that, in holding over to the second year, a new arrangement was entered into with the landlord for the second year." In the opinion by Mr. Justice Sneed, these instructions to the jury were held to be correct, and it will be noticed that in that case the Judge said if the tenant held over after the expiration of the first year, he would be bound for the whole of the second year's rents, unless he prove that he made a new arrangement with the landlord for the second year. In this case, while there were efforts to make new arrangements for the second year, none, in fact, were ever made, different from the terms under which the defendant held the first year.

In *Brinkley v. Walcott*, 10 Heisk., 24, it appears there had been a yearly rental at the price of \$4,000 per annum, payable monthly in advance, the contract beginning the first day of September, 1866, and ending the 31st of August, 1867. On the 20th of July, 1867, the agent of Mr. Brinkley, the owner of the property, notified the defendants that if they held over after the expiration of the old lease, on the 31st of August, they would have to take the premises for the succeeding year at \$5,000, payable in monthly installments of \$416.66 in advance. When the tenants were so notified by the agent, they replied the rent was too high, but would not say whether they would hold over or vacate the premises. They did not

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vacate them, and on the 2d day of September, the agent called for payment of the first monthly rent of \$416.66. At this time the tenants informed the agent the rent was much too high, but that they were willing to give that much by the month as long as they continued to occupy the property, or until they could get another place, or that he was willing to keep it for a year at \$4,000. The agent informed the tenant he had no authority to change the terms of the contract, and left, the tenant paying the rent for September, at \$416.66. On the 31st of October, the tenant vacated the premises. The suit was brought to hold the tenant liable for the whole of the succeeding year's rent at \$5,000 per annum, and in passing upon the question of liability, the Supreme Court, speaking through Mr. Justice Sneed, said: "If they (meaning the tenants) did not decide to accept these terms, it was their duty to have vacated the premises before the 1st of September. If these terms were not accepted, the plaintiff was upon that day entitled to the possession, and the mere fact that with this notice they continued to hold possession after that date, in the absence of a different agreement, is sufficient evidence that they accepted the lease for the next year upon the terms proposed by the plaintiff, and the contract thereby became complete. . . . They were notified by the plaintiff that if they held over, he would treat this as an acceptance of his terms. They did hold over, and it is this fact which constitutes their acceptance of the contract." In passing upon the effect of the landlord receiving the rent for September, the Supreme Court has this to say: "In receiving this money, the plaintiff only received what, by the terms of the previous contract, he was entitled to. The defendants, in paying it, were not making a contract; they only paid what they were then

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legally bound to pay, and they had no right, in making this payment, to annex to it a condition not previously existing, and make the acceptance of their money an acceptance of their conditions." While in the case of *Brinkley v. Walcott, supra*, the landlord's proposed terms for another year were made to the tenant before the expiration of the yearly contract, yet we do not think that affects the principle decided in that case. Taking the findings of the Circuit Judge in this case, that negotiations between plaintiff and defendants were ended on the 18th of September, and they were at that time without any agreement for the occupation of the premises for another year, and, in fact, had no contract for even another month, and in this attitude the plaintiff informs the defendant the terms on which he can remain in possession of the premises, to which no reply is made by the defendant. In the language of Mr. Justice Sneed, if the defendant did not decide to accept the terms stated in Mr. Glascock's letter of the 28th of September, it was his duty, then, to at once vacate the premises and restore the possession to the plaintiff. If the terms embodied in that letter were not accepted by the defendant, the plaintiff was at once entitled to the possession of her property.

Applying the statement of Mr. Justice Sneed to the facts of this case, the mere fact that, with this letter of the 28th of September in possession of defendant he continued to use and occupy the premises after that date, without any other or different agreement, furnishes sufficient evidence that he accepted a lease of the property for the next year upon the terms stated by plaintiff therein, and the contract thereby became complete, and defendant bound for another whole year's rents for the place. Applying further the statement of Mr. Justice Sneed,

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defendant was notified by the plaintiff that if he continued to hold over, he would treat such holding as an acceptance of the terms of the former lease. He did hold over, and it is this holding over by him which constitutes his acceptance of the contract, and thereby binds him for another full year's rents.

In *Noel v. McCrary*, 7 Cold., 624, Mr. Justice Shackleford says: "It is the duty of the tenant, at the expiration of his term of leasing, to restore the property to the landlord. He cannot impose terms on him as to the possession of the property. To avoid the liability the law throws upon him, he must surrender the possession. If he refuses to quit, the landlord will not be justified in resorting to force to put him out. He may either resort to his legal remedy to get the possession, or treat him as a tenant. The tenant must, at the expiration of the term, give the landlord the complete possession of the property; and unless this is done, the tenant's responsibility for rents will not cease and he will be deemed to hold upon the terms upon which he entered into possession." Mr. Justice Shackleford says, the tenant cannot impose upon his landlord as to the possession, and to avoid liability for another year's rent, he must surrender the possession to his landlord, and if he fails to do so, the landlord may treat him as his tenant for another year, and in such case he will be deemed to hold upon the terms upon which he entered into possession.

Referring further to the failure of the defendant to reply to Mr. Glascock's letter of the 28th of September, and to his continuance in possession of the property thereafter and the payment of rents at \$40 per month, it might be enlightening to quote what Mr. Underhill has to say on this point, in his work on Landlord and Tenant, pp. 142, 143 and 144, 1st Vol. In the close of section 98, p.

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142, he says: "Where the landlord expressly states his intention and the tenant is silent, the tenant will be presumed to have assented to the proposition," citing the Supreme Court of Texas as sustaining the text. In section 99, p. 142, Mr. Underhill says: "The presumption that the tenancy from year to year which arises from a tenant holding over, is on the same terms as to rent, as was the original lease, may be overcome by clear proof that the parties to the original lease, on or before its expiration, agreed that the rent would be modified on the holding over." There is no pretence in this case, that the parties ever reached a different agreement, though it is conceded they made an effort to do so, but failed, when the defendant continued in possession and paid the same rents for four months after the expiration of the yearly contract. Again, Mr. Underhill says: "And if either after or prior to the termination of the lease, the landlord informs the tenant that in case he holds over after the expiration of his existing term, a greater rent will be expected from him than he has paid under the original lease, and the tenant holds over without saying anything in reply to the landlord's demand or notice for an advanced rent, his continuing in possession taken in connection with his silence, will be regarded as an assent on his part to pay the advanced rent." Again this learned author says: "Where the tenant, holding under a lease in writing from year to year, is told by his landlord during any one of the yearly periods that his rent will be greater on the ensuing year, and he thereafter holds over, it will be conclusively presumed that he has agreed to pay an increased rental, and the terms of his lease will be modified accordingly." On p. 144, section 99, the learned author again says: "The tenant's conduct in continuing in possession after notice by the landlord,

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is an acceptance of the landlord's proposition," and finally at the close of that section the learned author lays down this rule: "In conclusion it should be stated that the presumption that a tenant who holds over upon the terms of the original lease, is not rebutted by proof of a different intention on the part of the tenant alone which is not communicated to or assented in by the landlord." In note 51, p. 143, and excerpt from an opinion is quoted by the learned author as follows: "The tenancy under the agreement expired at mid-summer, 1826. Immediately after that time, the plaintiff (the tenant) was a trespasser, but the landlord was not obliged to treat him as such, but might make proposals to him to renew the relation of landlord and tenant between them. This he did, and the plaintiff would not say I will go out directly. His silence is tantamount to saying I will continue on the terms of your proposals. I think the landlord had the right to make any terms he pleased for the time subsequent to Ladie's Day, 1827, and if the plaintiff did not accept them, to turn him out of possession."

Applying these rules to the case under review, it seems to us conclusive of the case that when Mr. Glascock wrote to the defendant on the 28th of September, the letter quoted, *supra*, and he did not reply to it, but remained in possession of the premises and continued to pay the rents according to the terms of the old contract, that he became bound thereby for the rents of the property until the 31st of August, 1912. If he did not intend to hold the possession until that date and pay the rent for that time, it was his duty to surrender the possession to the plaintiff, that she might secure another tenant. His failure to do so, his silence in respect to the letter, and his payment of the rents, raise a conclusive presumption that

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he had agreed to hold the property the remainder of the year under the terms and conditions of the old contract. If he felt that he was not bound to do so, or if he did not intend to hold the property but to vacate it when he secured another house, it was his duty upon receipt of the letter of the 28th of September, to at once notify the plaintiff of that fact, and to at once vacate the premises and surrender to her possession thereof. After receiving this letter he then had no right to hold the possession to suit his convenience and pleasure in securing another house, intending to surrender it when he found one that pleased him. Having remained in possession, paid the rents, and remained silent as to his intention, we are of the opinion that he is now estopped from saying that he is not bound for the whole rents until the 31st of August following.

Some stress is laid in the brief of defendant's learned counsel, on the fact that in each check he sent for the rents, he specified the month for which the payment was made. We do not attach any importance to that fact as indicating what his intentions were as to the possession of the property. It is doubtless true that in all instances where payments were made by check he indorsed thereon the month for which the payment was made. It is common knowledge that such is the common practice of tenants when paying rents due for property rented by them.

We think the defendant is liable for the whole year's rents because he held over after the expiration of the yearly contract, and we are inclined to think he is, because he failed to show any new or other, or different arrangement; yet, it is certainly true that he is bound for the remainder of the year because of his failure to reply to the letter of the 28th of September, and because he

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kept possession of the place thereafter and paid the rents according to the terms of that letter. He is conclusively presumed to have agreed to its terms and cannot be heard to say he did not.

It results that the judgment of the lower Court is erroneous, and it is thereby reversed. Judgment will be entered here for rents for the eight months from January 1st to August 31st, in favor of the plaintiff against the defendant, and for all the costs of the cause.

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PLANTERS PACKET COMPANY v. J. W. COFER.

Writ of certiorari denied by the Supreme Court.
(*Jackson*. April Term, 1914.)

1. *CARRIER AND PASSENGER. Steamboat. Assault by engineer.*

The owner of a steamboat engaged in carrying passengers is liable for an assault made upon a lower-deck passenger by an engineer. A boat passenger has the right to expect and demand kind treatment from every servant of the owner; and the courts will not allow an escape from liability upon the ground that the servant was acting beyond the scope of his employment.

2. *SAME. Passenger at place not assigned to passengers.*

A passenger upon a steamboat does not lose his right to personal security and respectful treatment from the servants of the owner by going into a place not assigned to the use of passengers if he did so innocently or inadvertently.

3. *SAME. Master and servant. Punitive damages.*

A carrier may be visited with punitive damages for a wanton or malicious assault made by one of his servants upon a passenger.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County. T. B. PITTMAN, Judge.

BIGGS & EVANS for Plaintiff in Error.

L. B. HARRISON for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court:

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DEFENDANT in error is a colored man. While riding on a steamboat owned by plaintiff in error he was struck and injured by a white engineer who had charge of the engine and engine room on the boat in question. Cofer was a passenger from Whitehall to Memphis, and was assaulted between these two points. He was riding at the time as a deck or lower boat passenger. For this assault and consequent injury and humiliation he instituted this suit. It was tried by the Circuit Judge without the intervention of a jury. Judgment for \$500.00 was rendered. The packet company excepted and has appealed in error to this Court. We shall take up the several assignments of error and treat of them in the following order: That is, Nos. 1, 2, 4 and 5 shall be considered together. These assignments are, in substance, that there is no evidence to support the verdict, and that the verdict was not under the law justified, because the assault upon the part of the engineer was a purely personal one, and that it was his individual and willful act; and, further, that at the time of the assault and battery, plaintiff below had lost his rights as a passenger, or was not in a position to claim the protection of a passenger.

A brief reference to the facts will be necessary to dispose of these questions. It is well that we preface this with a reminder that it is not in our province to settle disputed questions of fact nor to determine upon which side the preponderance of evidence is. It is simply our duty to keep in mind the judgment of the lower Court in favor of plaintiff below upon all those issues, and then to determine whether these findings are supported by any material evidence. An adherence to this rule will render inapplicable and inappropriate much of the discussion of learned counsel for plaintiff in error.

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There was introduced evidence tending to show that this negro was accepted as a passenger and assigned to lower deck; that after the boat had been some time on its passageway down the river, Cofer became thirsty and made inquiry of someone as to where and how he could get a drink of water. The party whom he asked (and who this was it is not shown) directed him to go over to a large keg upon a shelf or table, in what was known as the engine room. As we can best picture it, this engine room is a mere cut-off place in the larger room or apartment of the lower deck. It seems that this larger apartment has benches around it upon which the deck passengers and roustabouts are accustomed to sit, and that there is a narrow space between this cut-off engineer's apartment and the larger room. It appears that next to this keg was hanging a cup or dipper, and that the arrangement was such as to indicate that those desiring water could approach and get it. The negro was ignorant of the customs of the boat and was unaware of the exclusiveness of the engineer's apartment, and did not know that this keg was reserved for the use of the engineer or white people. In this frame of mind he approached the keg and was in the act of filling the cup for the purpose of drinking when the engineer suddenly and without warning hit him a heavy blow upon the jaw, at the same time using a vile epithet and telling him that no negro was allowed to use that water. Plaintiff below states that the engineer was preparing to strike him a second time when somebody intervened or something occurred to prevent. We must accept the statement of plaintiff below that he acted innocently and without any apprehension that he was doing anything wrong, and without any thought that he was beyond his position or the scope of his rights as a passenger. We must put aside as eliminated by the trial Judge the

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contention that he knowingly went into an apartment to which he had no right and defiantly or impudently attempted to use water vessels belonging to or assigned to the engineer.

We are of opinion that the judgment of the Circuit Judge is sustainable under the facts and under the law. It is not worth while for us to enter into an elaborate discussion of the authorities. Learned counsel for defendant in error has labored entirely too much in examining and setting forth decisions bearing on this question, as the rule is well settled by our own adjudications. The authorities referred to by learned counsel for plaintiff in error, or such of those as were accessible to us, have been carefully pondered. The Tennessee decisions referred to by him are not contrary to the principles upon which a recovery can be sustained in this case. The truth is, that they are rather in accord. See *Railroad Co. v. Starnes*, 9 Heiskell, 56; *Railroad v. Garrett*, 8 Lea, 438; *Railroad v. People*, 104 Tenn., 431. Each of these cases might be cited to support the proposition that the master is liable for the consequences of the act of a servant who is at the time discharging a duty or neglecting to discharge a duty owing by the master to the party injured. The decisions from other jurisdictions and the text writers referred to, conceding that they sustain the view insisted upon, cannot control the well-settled rules of our own Courts. The trouble arising from the application of these rules or of distinguishing the propositions lies in a failure sometimes to bear in mind the difference in the law of master and servant in passenger cases and other relations.

The rule in this State is that the carrier owes to each passenger the duty of seeing that each servant treats the passenger with courtesy, respect and due care. As it may be otherwise expressed, when the question of the comfort

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or security of the passenger is involved, each servant of the company is representing the master in seeing that the passenger is made secure and comfortable; and this duty includes the obligation of each servant to refrain from mistreating or injuring the passenger. If any servant so far forgets this duty as to assault or abuse a passenger, the master is liable, for the reason that the servant is violating an obligation which each passenger has the right to demand of the carrier-master: *Railroad v. Rhea*, 17 Pickle, 1; *Transportation Co. v. Smith*, 16 Lea, 498; *Traction Co. v. Lane*, 19 Pickle, 376; *Railroad Co. v. Martin*, 3 Tenn., 551; Moore on Carriers, section 267; *Steamboat Co. v. Brockett*, 121 U. S., 627; 30 Law. Ed., 1049; *Neville v. Railroad*, 18 Cates, 96.

So that when the engineer suddenly assaulted and beat Cofer, he was guilty of a breach of duty owing by his employer; and under the authorities cited it is not material to determine whether the servant acted upon his own impulse. It is true that if the engineer and the plaintiff below had gotten into a scuffle and the engineer had undertaken to defend himself, or if the plaintiff below had by his deliberate conduct justifiably provoked the anger of the engineer, there might be some ground upon which to insist that there is no liability. But we repeat that such is not the case. The evidence clearly brings Cofer's case within the rules laid down.

It is strenuously insisted that Cofer was out of his place and that the engineer had the right to assault him. This contention cannot stand consistently with the facts which the strongest legitimate view of the evidence tends to show, nor with the rules of law governing such cases. The *Brockett case*, *supra*, is very apposite. That was a case in which the steamboat passenger had not put himself in a position contrary to the rules of the company

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of which he was ignorant. It was held by the Court, speaking through Justice Harlan, that the fact that the passenger got into an area not assigned to passengers did not deprive him of the right to protection against the wrongs and aggressions of each the servant of the master. If this had been a case of mere negligence, the position taken and the authorities cited would have direct application; but it will be held of no avail against an intentional, willful infliction of wrong. Carriers are liable for such acts of their servants, even when inflicted upon trespassing parties on cars, carriages or boats.

It is said in the remaining assignments of error that the facts did not justify the infliction of punitive damages, and that the damages awarded are excessive. It suffices to say that all the authorities mentioned by us as sustaining the proposition that a carrier is always liable for injuries willfully inflicted upon passengers also sustain the proposition that for such injuries, although unauthorized by the carrier, or beyond the *apparent* scope of employment of the particular agent as directed by the master, the master is likewise liable for punitive damages.

We are of opinion that the facts in this case warranted the assessment of exemplary damages, and that the amount awarded is not so excessive as to indicate passion, prejudice or caprice. The proof tends to show that the plaintiff below received a severe lick at the hands of the engineer, such as made him uncomfortable for several days and such as demanded the attention of a physician. The blow was inflicted under circumstances calculated to shock anyone and to cause a keen sense of outrage and mistreatment. It is true that the plaintiff is a colored man, but we agree with the learned trial Judge that it is time that public carriers of this country, especially steamboat operators, should be informed that they owe duties to colored

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men that must be observed, and that they must refrain from treating them as beasts. The best way to guarantee freedom from such outrages is to make the owner pay goodly sums of smart money.

We feel constrained to overrule all the assignments of error and to affirm the judgment of the lower Court with costs.

J. J. CHRISTIE v. MRS. A. L. WILLIAMSON.

Writ of certiorari denied by Supreme Court.

(*Jackson*. April Term, 1914.)

1. FURNISHERS' LIEN. *Agreement with contractor.*

In order to have and enforce a furnishers' lien, as provided by section 3540 of Shannon's Code, it is incumbent upon lien claimant to show that he had a contract with the contractor, who is building for another, and that the materials sold were actually used by the contractor.

2. SAME. *Suit by furnisher or sub-contractor parties.*

The lien of a furnisher or contractor can be enforced by attachment only. And the contractor and owner must both be made parties; and the attachment should ordinarily issue simultaneously with the summons.

3. SAME. *Separate warrants or summons.*

While the proper or better practice is to sue both the owner and the contractor in the same warrant or summons, the proceeding will not be dismissed if separate warrants are used, provided they are returned simultaneously and the two causes are tried as one.

4. SAME. *Irregularity. Abatement. Time to make objection.*

Even if proceedings for the enforcement of a furnishers' lien are irregular, it is the duty of the landowner to object at the first opportunity. It will be too late to do so after appeal to the Circuit Court.

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5. SAME. *Appeal to Circuit Court by owner, contractor not appealing. Adjudicated claim.*

Such proceedings regularly tried before a justice of the peace cannot be dismissed in the Circuit Court for failure of the claimant to bring up the case against the contractor, who did not appeal from the justice's judgment. In such case the claim against the contractor became an adjudicated one, and he was no longer a necessary party.

FROM MADISON COUNTY.

Appeal in error from the Circuit Court of Madison County. S. J. EVERETT, Judge.

D. W. HERRING for Plaintiff in Error.

W. G. TIMBERLAKE for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS suit was begun before a justice of the peace of Madison County to enforce a subcontractor's or furnisher's lien on the real estate of the defendant, Williamson, upon the ground that he furnished materials under an agreement with a contractor, Mr. Percy, to be by him used on the property of Mrs. Williamson, and that they were so used in building a house on the land described in the pleadings. An attachment was issued in this case, dated 28th of June, 1912, based upon the affidavit of the plaintiff, Christie, to attach the realty described in it. At the same time the justice issued a warrant for the defendant, Mrs. Williamson, to appear before him to answer the complaint of the plaintiff, Christie. It is recited in the warrant that an original attachment had that day been begun against Mrs. Williamson's real estate, to enforce a mechanic's and fur-

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nisher's lien to the amount of \$250. The attachment was levied by the constable on the realty described in it, on the same day it was issued, and the warrant executed on Mrs. Williamson on that date. She was cited for trial before Esquire Taylor on the 4th of July, 1913, at 4 o'clock P.M. The contractor, Mr. Percy, was not sued, nor did his name appear in the warrant. In the affidavit on which the attachment was based, and also in the attachment issued thereon, it was recited that plaintiff, Christie, had furnished the defendant, Percy, materials, naming the kind, to the amount of \$250, which were used in the construction and building of a house upon the real estate described in the affidavit and attachment, the property of Mrs. Williamson. On the 1st day of July, after said attachment and warrant were issued and served on Mrs. Williamson the magistrate issued a warrant in favor of plaintiff, Christie, against the contractor, Percy, requiring him to appear before the magistrate to answer Christie's complaint in a plea of debt due by account for the sum of \$250, for paints and other material furnished Percy under a special contract, in the building of a house upon the property of Mrs. Williamson, described in the warrant. In this warrant it was recited that said \$250 was owing by Percy to plaintiff for paper, paints and labor furnished and used in the building of said house which was completed the last part of May, 1912; that Percy had a special contract with Mrs. Williamson to construct such house, and that plaintiff had a mechanic's and furnisher's lien under the statute on Mrs. Williamson's realty for the payment of the debt due by the contractor to Percy. The issuance and levy of the attachment mentioned above was recited in this warrant, which was returned for trial before the same justice, Taylor, on the 4th of July, 1913, at 4 o'clock P.M., when and where the defendant, Percy, was commanded to appear and make

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defense against the suit to recover a judgment against him for \$250. It thus appears that while the first warrant was issued alone against Mrs. Williamson, and the second one issued alone against the contractor, Mr. Percy, they were both returned for trial on the 4th of July, 1913, at 4 o'clock P.M., before the same justice, M. H. Taylor. The constable who served the warrant issued against Percy, executed it and cited him to trial before Justice Taylor on the 4th of July, 1913, at 4 o'clock P.M., and it thus appears that while the names of both of these defendants did not appear in the first warrant issued, nor in the second warrant issued, they were both sued about the same matter—that is, the same debt, created by Percy for paints, paper and other material used by him in the construction of a house for Mrs. Williamson on her lot; that both warrants were returned for trial before the same justice, on the same day and at the same hour. It is true the attachment, which was levied upon the land was issued at the same time the first warrant was issued against Mrs. Williamson, but the summons issued against Mr. Percy recited the issuance of this attachment, and very fully states the object and purpose of the same. The cases were not tried on the 4th of July, but were heard on the 8th of July, 1913, at 4 o'clock P.M. The judgment of the magistrate rendered by him and entered on the papers in the case on the 9th of July, 1913, shows that when the case was called for trial, the plaintiff was present with his attorney, the defendant, Williamson, was present by her attorney, but that the defendant, Percy, came not but made default. The judgment then recites that the evidence was heard, and counsel made their arguments, and it appeared from the proof that the plaintiff, under special contract with the defendant, Percy, furnished to him paints, paper and labor for the purpose of constructing and furnishing the house for the defendant,

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Williamson, on the lot described in the judgment, and that they were so used by defendant, Percy, and that he owed plaintiff, Christie, for the paints, paper and labor so furnished, the sum of \$250, and that this amount constituted a lien upon the realty of the defendant, Williamson, the plaintiff having given her notice in writing as required by law that said lien was claimed. It is further recited in the justice's judgment that the attachment issued in the case, had been levied upon the realty of the defendant, Mrs. Williamson, within the time by law provided, and that plaintiff, Christie, was entitled to a personal judgment in his favor against the defendant, Percy, for \$250, the amount of debt as proven, and was entitled to a mechanic's and furnisher's lien upon the realty and improvements thereon attached in the cause, describing by metes and bounds the land on which the improvements were made. The justice then proceeds to render a judgment in favor of plaintiff, Christie, and against the defendant, Percy, for the sum of \$250 and the costs of the cause, and to secure the same it was the judgment of the Court that the attachment sued out and levied upon the land be sustained, and the papers be certified to the Circuit Court for further proceedings to be had as required by law. The contractor, the defendant Percy, was satisfied with this judgment against him, and did not appeal to the Circuit Court; but the defendant, Mrs. Williamson, being dissatisfied with the judgment of the Court sustaining the attachment, and holding that plaintiff had a lien on her property, appealed therefrom to the Circuit Court, and when the cause reached that Court, her counsel moved to quash and discharge the attachment sued out by plaintiff against her property, and to dismiss plaintiff's suit, because of facts appearing upon the face of the papers which constitute the record of this case, the grounds of said motion being stated orally. The

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Circuit Judge sustained this motion, and quashed said attachment, and his suit against the defendant, Mrs. Williamson, was dismissed. From this action of the trial Judge plaintiff appealed to this Court, and has assigned as error the action of the trial Judge in quashing the attachment and dismissing his suit as to the defendant, Mrs. Williamson. There was no motion made by the defendant, Percy, in the Circuit Court, and inasmuch as he had not appealed from the judgment of the justice against him for \$250, it was clear that he was not then before the Circuit Court, and that the defendant, Mrs. Williamson, appeal only brought the case up to that Court as against her. Appellant's learned counsel earnestly insist that a great injustice has been done him by the Circuit Court in the quashing and dismissal of his attachment, the result of which is, he loses his debt against the defendant, Percy, which he will not be able to collect unless the statutory lien, provided for him, is enforced. In order that he have such lien, there must be a contract by him with the original contractor, Percy, that the materials he furnished were to be used in building or repairing or improving the property of Mrs. Williamson, and that such material was furnished under a special contract to be used on her building, and were actually so used by him, the contractor Percy. 6 Pickle, 521; 7 Pickle, 469. This lien is provided for in section 3540 of Shannon's Code, being a compilation of various acts of the Legislature passed for the protection of mechanics or subcontractor or furnishers of material to be used under a special contract or the building on which the lien is sought to be enforced. This lien of the subcontractor, or furnisher, can only be enforced by attachment. 107 Tenn., 41. The clerks of the Courts of record cannot issue the attachment except on the fiat of a Judge. 110 Tenn., 251. It was held in 4 Bax., 444, that the at-

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tachment to enforce the lien may be incorporated into, or with the summons, and become a part of it. Justices of the peace are not expressly given power to issue these attachments, but as they have jurisdiction to enforce such liens, implied power to issue the attachment arises from the jurisdiction conferred to enforce the lien. It was held in 10 Cates, 554, that the attachment and warrant must be sued out at the same time, or "simultaneously," as expressed by Mr. Justice Shields. He further held that both the contractor and the owner of the land on which the lien is sought to be fixed, must be sued in the same warrant, and that the warrant should contain a brief recital, or statement, that an attachment had been issued against the property of the owner, to enforce the mechanic's or subcontractor's lien. 10 Cates, 555. The learned counsel of Mrs. Williamson insist that inasmuch as when the first warrant was issued on the 8th of June, 1913, it did not run against both Mr. Percy and Mrs. Williamson, that, although another warrant was issued against Percy requiring him to appear before the same magistrate at the same time and place, such proceedings did not comply with the rules of procedure as set out by Mr. Justice Shields in the case cited in 10 Cates, *supra*, and for that reason the action of the trial Judge in quashing and dismissing the attachment was regular, and the only thing he could do. The contention of learned counsel, while ably presented and earnestly argued, is nevertheless highly technical, and it seems to us to be sticking in the bark hard and fast. It is true Mr. Justice Shields, in *Warner v. Yates*, 10 Cates, 550, says, "There must be a suit brought by the party seeking to enforce the lien, and an attachment sued out against the property upon which the lien is claimed, simultaneously with the issuance of the warrant. Where the suit is brought by a subcontractor, the principal contractor and the owner of

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the property upon which the lien is claimed must be made parties defendant." The reason why both must be sued, as stated by Mr. Justice Shields, is that the contractor must have his day in Court to contest the debt sued on or sought to be declared a lien on the land, and the owner of the property has a right to his or her day in Court to controvert the existence of the lien sought to be enforced, and he holds that the action cannot be maintained without establishing both the debt and the lien. We concede this holding to be sound, and supported by both authority and reason, but it may be stated here that Mr. Justice Shields does not hold that the owner of the property and the principal contractor may not be brought before the Court by separate warrants, and while he does say the attachment and warrant must issue simultaneously, yet we do not understand the learned Chief Justice to lay that down as a hard and fast rule to which there are no exceptions. In this case the summons issued against Mrs. Williamson and the attachment were issued simultaneously, the summons reciting the issuance of the attachment, and the purposes for which they were issued. In this way she has notice that a suit is brought to enforce a lien for an unpaid debt incurred for materials used in her building. The plaintiff did not, at first, seek to bring before the justice the principal contractor, Mr. Percy, but finding his mistake or discovering his error, he had, in a day or two thereafter, a warrant issued by the same justice, commanding the defendant, Percy, to appear before him on the very day and at the same hour the original warrant and attachment had been returned for trial, and the officer executing this process against Mr. Percy, commanded him to appear before the same justice, at the same hour, and to controvert the plaintiff, Christie's, debt then sued on. All of these papers including the attachment and the warrant first issued and

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the second warrant issued against Percy, clearly and unmistakably notify both the defendant, Percy, and Mrs. Williamson, the purpose and object of the suit, and that plaintiff sought to recover judgment against the principal contractor, Percy, for \$250, the value of the material furnished by him and which was used on, or in, the house, and that he sought to enforce his lien against the realty improved, as provided by statute. While the proceedings were not in strict conformity to the rule laid down by Mr. Justice Shields, yet, we are of the opinion that they substantially conformed to the rule of procedure formulated by him. These processes brought before the justice the principal contractor and gave him an opportunity, or his day in Court, to controvert or dispute plaintiff's claim of the debt of \$250 against him. They gave to the defendant, Mrs. Williamson, her day in Court to controvert and deny plaintiff's right to subject her property to the enforcement of his lien against it for the payment of his debt against Percy, the principal contractor. They both had their day in Court, before the same justice, at the same hour, and both for the purpose of disputing and controverting the claims of plaintiff as asserted respectively against each of them, although one of them was brought into Court by one warrant issued on one day, and the other brought into Court on a different warrant issued at a different date. It would have been better if but one warrant had issued against both the principal contractor, Percy, and the owner of the realty against which the lien was sought to be fixed; but is it not sticking too much in the bark, and being entirely too technical, to hold that because this procedure was not followed, although in a different way both were brought into Court at the same time, and before the same justice, and had their opportunity to controvert and dispute the claims of plaintiff? We are of the opinion that the judg-

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ment of the justice on these proceedings, which are properly before us as a part of the technical record, shows that what the parties did when they appeared at the time and place commanded, was to consolidate and hear together both of these warrants, and that they were heard together as one suit without objection on the part of either the defendant, Mrs. Williamson, or Mr. Percy. The recitations in the justice's judgment show that the defendant, Williamson, was present by counsel; that the plaintiff was present, and that the defendant, Percy, did not appear, but made default, and thereupon proof was heard by the justice, plaintiff's debt against the defendant, Percy, established and his right to a lien on the defendant, Williamson's, property shown to exist, after which the justice rendered judgment against Percy in favor of plaintiff, and sustained the attachment, holding that plaintiff had a lien on Mrs Williamson's property to secure the judgment rendered against Percy. There does not appear in these proceedings, nor is it insisted by Mrs. Williamson's learned counsel, that she or he raised any objections to the proceedings taken by the justice in this matter when the cause was called for trial before him, and we must assume and presume that by oral agreement the whole matter was submitted to him to be determined in one trial upon the whole proof and all the papers issued by him in this cause; or, in other words, that the two warrants were consolidated, or the latter treated as a counterpart of the first one issued. Under section 5988 of Shannon's Code it is provided, "Every indictment is in favor of the sufficiency and validity of proceedings before justices of the peace, when brought in question, either directly or collaterally, in any of the Courts of the State, where it appears upon the face of the proceedings that the justice had jurisdiction of the subject matter and of the parties." It is stated by Mr. Shannon, and we

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believe it to be true, that our Courts have repeatedly made liberal intendments in favor of the proceedings of justices of the peace; citing a number of cases supporting this statement. In this case it appears on the face of the proceedings the justice had jurisdiction of the subject matter and of both parties, though both were brought before him by separate warrants. The amount involved was clearly within his jurisdiction, and the statute expressly gave him jurisdiction to enforce by attachment subcontractor's liens, and in such case we are bound to presume in favor, not only of the sufficiency of the proceedings before him, but of their validity, as this statute provides. The reason and policy of the law for giving every intendment and presumption in favor of the sufficiency and validity of proceedings before justices, is too well known to be mentioned here, and while in this case the proceedings were not altogether regular, we think it would be too technical to hold that they were so irregular and invalid as to authorize their dismissal as was done by the learned trial Judge. It has been repeatedly held that the remedial features of the mechanic's and furnisher's lien law—that is, the remedy provided for the enforcement of these liens—will be literally construed by the Courts, and when the party claiming the lien has shown, in the way provided by law, that it exists in his favor, then the Courts will be exceedingly liberal in enforcing the remedies provided in his favor. 5 Pickle, 453; 8 Pickle, 306; 7 Bax., 199; 4 Lea, 557, and other cases which might be cited.

The Supreme Court, in an opinion delivered by Special Justice Henderson at Knoxville in 1907, and reported in 11 Cates, 497, in the case of *Luttrell v. The Railroad*, quoted approvingly from 2 Jones on Liens, section 1303, as follows. "He (meaning the subcontractor or furnisher) should either obtain a judgment

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against the contractor before bringing an action to enforce the lien, or he should make the contractor a party to that action. . . . He—that is, the owner of the land against which the lien is sought to be enforced—ought to be furnished with an adjudicated claim and not with a mere open account.”

In an opinion delivered by the Supreme Court of Iowa, 71 Iowa, 347, from which a quotation is made, it is said: “If the claim were liquidated, it may be the principal contractor would not be a necessary party,” and in the closing part of the excerpt from the Iowa case, it is again said: “He ought to be furnished with an adjudicated claim, and not with a mere open account.” We think, in this case, that the defendant, Mrs. Williamson, was presented with an adjudicated claim, or rather that the claim of \$250 by plaintiff against Percy, was adjudicated and settled in the suit by the Justice Taylor, as is shown by his judgment entered on his papers. The defendant, Percy, did not dispute or controvert the correctness of the justice’s judgment against him, but was satisfied with it, and for that reason prayed no appeal therefrom. It then became an adjudicated claim between plaintiff, Christie, and the defendant, Percy, and he, not having appealed from such adjudication, was forever bound thereby. When the cause reached the Circuit Court on the appeal of the defendant, Mrs. Williamson, plaintiff’s claim against the defendant, Percy, was still an adjudicated claim. The appeal of the defendant, Mrs. Williamson, did not affect that adjudication nor operate to set it aside or in any way annul it, and when her learned counsel made his motion in the Circuit Court, to quash and dismiss the proceedings as to her, the claim of plaintiff, Christie, against the defendant, Percy, was then an adjudicated one—was no longer an open account, but

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had merged into the judgment of a Court which had jurisdiction of the subject matter and of Mr. Percy, one of the parties to the suit, and for these reasons we are of the opinion that the defendant, Williamson, had no right to have the attachment quashed and dismissed. While the proceedings, from the incipency of this cause up to the time of the rendition of the judgment by the justice, were irregular, yet we are bound, under the statute, to presume in favor of their validity, and we hold that the magistrate's judgment shows that the parties, at the time it was rendered, had either expressly or tacitly agreed that the justice should hear and determine the case upon its merits, which he proceeded to do without any objections on the part of defendant, Mrs. Williamson, or her able counsel.

In the case of *Luttrell v. Railroad, supra*, the subcontractor was not made a party to the suit, but the furnisher sued only the principal contractor and the owner of the property on which the lien was claimed. The question was made in that case, that the subcontractor was a proper party, but the learned special justice held that the railroad company, against whose property the lien was sought to be enforced, had waived the right to make the question by answering to the merits of the bill. It is true that was a case in Chancery, but we think that in proceedings before justices, equally as liberal a rule should prevail as does when the suit is in a Court of Equity, and that if the defendant, Mrs. Williamson, objected to the proceedings as they were at the time the justice heard the case, she should have then made known her objections instead of waiting until she reached the Circuit Court and raised the question at a time when plaintiff's lien was lost, if the proceedings were so irregular and invalid as required their dismissal as to her and her property. She

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did not make her objections before the justice, but, we think, from the judgment of the justice, she tacitly assented to proceed with the case as if the proceedings were regular and in conformity to law. It has been held by the Supreme Court that there is a strong and growing inclination upon the part of the Supreme Court, repeatedly announced, to escape from the embarrassments of technicalities that are empty and without reason, and tend to defeat law and rights, 103 Tenn., 648; 109 Tenn., 167.

In the case of *Wilson v. State*, 109 Tenn., 167, the Supreme Court said: "The day is past for rescuing the guilty by mere technicalities, and when guilt is clearly established, and the merits have been reached, there will be no reversal except for substantial errors which have deprived defendant of some constitutional or legal right." and we think the technicality insisted on in this case is "empty and without reason," and we are not inclined to allow them to defeat a meritorious claim and deprive plaintiff of his remedy to enforce his lien as given him by the Legislature, and for the foregoing reasons it is our opinion that the judgment of the Circuit Judge was erroneous, and his action in quashing the attachment and dismissing the proceedings as to the defendant, Mrs. Williamson, and her property, must be reversed and the cause remanded to the Circuit Court of Madison County for further proceedings. The defendant, Mrs. Williamson, will pay the cost of this appeal.

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E. T. BAKER v. IDA BATES.

Writ of certiorari denied by the Supreme Court.

(Jackson. April Term, 1913.)

1. SEDUCTION. *Evidence supporting verdict. Corroboration of Plaintiff.*

An assignment of error that there is no material evidence to support a verdict for plaintiff in a seduction case must be overruled where the plaintiff below details the facts warranting the inference of seduction, although she is not corroborated by a single witness. It is for the jury to determine whether they will believe her statements.

2. JURY TRIAL. *Withdrawal of evidence by instruction.*

It will be presumed that a jury disregarded evidence which the trial Judge specifically instructed them not to consider. The burden is on the appellant to show that notwithstanding this instruction the incompetent evidence influenced the jurors.

3. EVIDENCE. *General character. Specific acts admitted by witness.*

Witnesses introduced to show that a party or another witness sustains a good character may, on cross-examination, be interrogated as to rumors of specific acts inconsistent with good character; and under this rule the witnesses may be interrogated as to admissions made by the party whose character is in issue.

4. SEDUCTION. *Punitive damages.*

Punitive damages are as a general rule recoverable in actions of seduction, and these damages do not have to be specifically claimed, nor need there be averred any other circumstances than those which usually accompany the debauching of a female.

5. SAME. *Instructions.*

An instruction of the Court upon punitive damages in the following language will be held sufficient, or at least not erro-

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neous, in the absence of special request: "You may if you see proper award plaintiff punitive damages." This instruction is not erroneous when applied to a case of seduction.

6. DAMAGES. *Excessive. Poverty of defendant.*

The poverty of a defendant in a seduction case affords no substantial excuse for mitigating the compensatory damages of a plaintiff in seduction.

7. DAMAGES. *Remittitur required by trial Judge.*

The action of the trial judge in requiring a remittitur is entitled to very great weight in this Court.

FROM PERRY COUNTY.

Appeal in error from the Circuit Court of Perry County,
N. R. BARHAM, Judge.

H. C. CARTER for Plaintiff in Error.

JOHN W. GREER for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

Defendant in error recovered a verdict of \$2,500.00 against plaintiff in error for seduction. Upon motion for a new trial, the Circuit Judge suggested and required remittitur of \$500.00. This was done by defendant in error under protest. The other grounds of the motion for a new trial were overruled and judgment pronounced for \$2,000.00 and costs. This appeal is prosecuted to reverse this judgment. The oral discussions and the briefs take a wide range, but we make it a practice to deal with such questions only as are presented to us upon the record.

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The first assignment of error is that there is no material evidence to support the verdict. The principal argument made under this assignment is that the first count of the declaration does not state a cause of action, and that the averments of the second count are not sustained by the proof, in consequence of which the verdict should be held to be without sustaining proof.

Learned counsel for plaintiff in error is mistaken in his assumption that the first count does not set forth a good cause of action. It is almost in exact accordance with the common law counts in actions of seduction, and as a matter of course, it must be held good if it meets the requirements of common law pleading. It averred in substance that defendant did wrongfully and wickedly seduce and carnally know the plaintiff, an unmarried female, in consequence of which she suffered in reputation, etc. This sets forth succinctly the elements of seduction as defined with more elaboration in *Graham v. McReynolds*, 90 Tenn., 673.

But if the first count should be held bad, the second one is conceded to be good; and the general verdict can be referred to it. This second count is in substance like the first, except that there is an averment that the defendant by false promises of marriage induced plaintiff to surrender her virtue.

It is argued that the whole case developed by plaintiff below was upon the theory of a false promise of marriage, and that this promise of marriage was not shown by the proof to have preceded the sexual act. The record shows otherwise.

Passing to the broad argument that there is no evidence to support the verdict, it suffices to say that if the jury in their wisdom determined to accord full credit to this woman, there is no ground upon which we can

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disturb the verdict. She makes out a case of deliberate seduction—the case of an old, experienced man who insinuates himself into the affections of a young, ignorant, inexperienced country girl, and by instilling in her the hope of a marriage, overcomes all her scruples and induces her to yield to him. It is the case of a widower inducing an unsophisticated female to believe that it is no harm to embrace, if the parties are engaged to be married, knowing at the same time that he is deluding the girl with an alluring promise of marriage. We cannot yield assent to the argument of learned counsel that Miss Bates is not to be believed. At all events, it was for the jurors, her fellow countians, to accept or reject her statements.

The second and third assignments are to the effect that the judgment of \$2,000 is excessive, and that the verdict should have been reduced more than \$500; and the insistence is here that because of the excessiveness of the verdict and the failure of the Judge to reduce it further, a new trial should be granted. To this latter proposition it suffices to say that Appellate Courts do not now reverse on account of excessiveness of verdict, but themselves undertake to rectify any errors with respect thereto. *Ry. v. Mallett*, 2 Tenn. C. C. A., 454.

The main contention is that the verdict is excessive because plaintiff in error is shown to be a poor man. This is a matter which may be taken into consideration, but it is of small importance in determining the extent to which an injured party should be compensated. But plaintiff in error is not such a pauper as to justify reducing to a minimum the claims of the defendant in error. We assume from the record that he is a man of some standing in his community, and that he is a capable farmer and business man. He is shown to be worth

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approximately \$4,000.00, and that he has good earning capacity. The physical and mental suffering of defendant in error and her disappointment in life were matters peculiarly within the province of the jury; and looking at the case from all sides, we are unable to discover anything that would indicate that the jury acted with passion, prejudice or caprice.

In the fifth assignment it is said that the Court erroneously permitted one Cunningham, a witness introduced by plaintiff in error, to testify that many years before the date of the trial, plaintiff in error had told him that he had passed himself off as a single man and had made love to a girl after he had married and had children. It was also assigned as error that the Court permitted this witness to testify that it was a part of the general character of plaintiff in error that the latter had had trouble with one George Bugg about his wife many years before the trial.

Cunningham had been introduced by plaintiff in error at an early stage of the case for the purpose of showing that he, plaintiff in error, sustained a good character and was entitled to full credit. On cross-examination, Cunningham was asked if it was not a part of the general reputation of Baker that he had said and done the things hereinabove mentioned. We pause to remark that these were legitimate matters of inquiry upon cross-examination, laying aside for the present the question of remoteness of time as affecting character. These questions were excepted to by Baker, upon the ground that the inquiry was as to matters that were too remote. The Court overruled these objections at the time they were made. The case proceeded in due course by the further presentation of evidence by both sides. When Baker took the stand in his own behalf he was asked about the incidents herein-

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above mentioned and specifically denied each of them. At this stage of the case the trial Judge stated in substance that he had reached the conclusion that these matters were not competent, and that the objections should be sustained. He proceeded to instruct the jury to exclude them from their consideration and to disregard the evidence of Cunningham upon the subject.

It is earnestly insisted by learned counsel that the harm had already been done, and that the subsequent withdrawal could not efface the impressions created nor neutralize their force. We feel constrained to take the contrary view. Baker had made his good character an issue, and had thus paved the way for interrogation as to incidents in his career, including declarations made by him to witnesses showing that he did not possess the good character claimed by him.

We are of opinion that the objection raised—namely, that of remoteness—made as it was in the presence of the jury, sufficiently brought to the minds of the jurors a sound reason why this testimony should have little or no weight. When in addition thereto we have the command of the trial Judge that they exclude it from their consideration, we must presume that they obeyed directions. At all hazards, appellant ought to show that injustice resulted. Again, the rule announced in former cases that Courts must reverse if incompetent evidence is admitted, does not now obtain. Appellants should convince the Courts that prejudice was the consequence. We are unable to see that plaintiff in error was prejudiced in the legal sense. New trials must not be ordered for trivial causes. The protest of the reformers is right in this respect.

In the sixth assignment of error it is said that the Court erroneously instructed the jury as follows: "You may, if you deem proper, assess punitive damages."

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This insistence is that this was a direct command to the jury to assess punitive damages: *Ferguson v. Moore*, 14 Pickle, 349. In the latter case it was held that the allowance of punitive damages was a matter of discretion and that it was error in the Court to instruct the jury that they should award them. We are of opinion that that is what the trial Judge did in the instant case. He simply stated in effect that they might if they deemed it proper to add punitive damages. It is true that the instructions could have been a little more elaborate on the subject, but there was no request for any amplified statement. The proposition laid down by His Honor was correct as far as it went. Hence, there can be no assignment of error respecting this matter: *Ry. v. Hill*, 2 Cates, 407.

It is also urged by learned counsel that the instruction was erroneous for the reason that there is nothing in the declaration authorizing the recovery of punitive damages. In this, we think he is mistaken. Punitive damages are generally awarded in actions of seduction, especially if the seduction was accomplished under a promise of marriage: *Goodall v. Thurman*, 1 Head, 209. It is not necessary that these damages be claimed *eo nomine*. It is sufficient if the facts alleged justify their recovery. *Railroad v. Ray*, 17 Pickle, 6; *Express Co. v. Brown*, 19 Am. St. Rep., 310.

Recurring to the fourth assignment of error, it is said that the Court erroneously refused to give in charge certain special requests, Nos. 3 and 4. Request No. 3 was in substance to the effect that where a promise of marriage is alleged to have been resorted to as the means of inducing the surrender of virtue, it is incumbent upon her to show that the promise of marriage was made antecedent to the sexual intercourse. Conceding the sound-

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ness of this proposition, learned counsel for defendant in error responds that the trial Judge in substance so stated to the jury, and, further, that the request is an abstraction, for the reason that there is no evidence calling for the same. He is correct in both respects. There is no intimation from anyone that Baker made any promise of marriage after having had sexual intercourse with Miss Bates. The proof is all one way, that any promise he made was made prior to their intimacy. In addition, we think His Honor sufficiently stated to the jury that it was incumbent upon Miss Bates to show that the promise of marriage was one of the means used to induce a surrender by her. We overrule this assignment.

The fourth request which it is urged the Court should have given was to the effect that if Miss Bates testified that Baker came upon her in the woods three times without previous arrangement, they might look to these facts in passing upon her credit as a witness. We are not aware of any rule of practice which requires a trial Judge to single out particular conduct of a single witness and call the attention of the jury thereto. Besides, we think the jury were given a sufficient number of rules by which to test the credibility of all witnesses, including plaintiff below. This assignment of error must be overruled.

It is urged by defendant in error that the Court erroneously required a reduction of the verdict to \$2,000. After carefully pondering this matter, we are of opinion that we should not disturb the action of the trial Judge in this respect. He is the thirteenth juror, and his opinion as to the amount of damages is entitled to weight. He saw plaintiff below and her family, and was enabled to judge of the extent to which she was injured. He likewise noted the conduct of the defendant and weighed the matters of mitigation. While this is a puzzling legal

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proposition—that is, the power to reverse the action of a Circuit Judge in reducing damages, we have concluded that we should not disturb the order made in this case.

Before concluding it is well that we respond to the contention earnestly and ably pressed upon us that as defendant in error is not corroborated in her statements respecting sexual intercourse, her judgment should be reversed; that there ought to be established in civil cases the rule that a plaintiff in seduction who is uncorroborated fails to sustain her case. This doubtless would be the better and safer practice. This would be an obstacle in the way of the blackmailer. But in the absence of a statute the Courts of the State would not be authorized to formulate such a rule of practice. The rule and the practice in this jurisdiction is that if the jury accept the version and the theory of the woman in the case, mere man must abide the consequences.

It results from the foregoing that the judgment of \$2,000 must be affirmed with costs.

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MRS. HATTIE TULLY AND HUSBAND v. YAZOO & MISSISSIPPI RAILROAD COMPANY.

Writ of certiorari denied by the Supreme Court.
(*Jackson*. April Term, 1913.)

CARRIERS OF PASSENGERS. *Waiting-room. Heating. Passenger waiting between trains.*

A passenger who takes passage at a station of a railway company, destined to a distant point on its line and who, because of schedule arrangements, occupies a waiting-room at an intervening station for several hours, may maintain suit against the company for neglecting its duty to keep its waiting-room comfortably heated. And the statutory provision that companies shall open and keep heated their waiting-rooms for one hour before the arrival and departure of trains has no application.

(FROM SHELBY COUNTY.)

Appeal in error from the Circuit Court of Shelby County, Division No. 1. J. M. YOUNG, Judge.

A. W. BIGGS and THOS. EVANS for Plaintiff in Error.
BELL, TERRY & BELL for Defendants in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS suit was brought by Mrs. Tully to recover damages alleged to be due her because of the negligent failure of defendant company to properly heat, make and keep comfortable a station house of the defendant com-

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pany at Clarksdale, in Mississippi, whereby, and on account of which failure, she was caused to take a severe cold, resulting in injury to her in certain respects, which will be hereinafter mentioned. There was a judgment in her favor in the lower Court for \$500 damages, and being dissatisfied with the amount, she prayed an appeal to this Court and assigned as error, that the verdict of the jury is so inadequate as to indicate passion, prejudice, caprice or corruption on the part of the jury. The defendant company has also appealed from the judgment against it, and has assigned as error the refusal of the Circuit Judge to sustain its motion for a directed verdict. Its assignment will be first disposed of.

It appears that Mrs. Tully, whose home was near Memphis, and who, at the time, was a married woman, was at Sunflower, in the State of Mississippi on the evening of the 26th of October, 1912, and wanted to go from that point to Hollywood, in Mississippi, both of which towns are on the line of the defendant's railway, and between which is the town of Clarksdale, Mississippi, at which latter place a change of cars was necessary in order to reach Hollywood. She had been in and around Sunflower, and further south, on defendant's line of railway for about ten days or two weeks, or perhaps longer, but on the 26th of October, being at Sunflower, decided to go from that place to Hollywood, and in order to do so had to go on defendant's train, but was forced to change cars at Clarksdale. About dark that evening she went to the ticket office of defendant company at Sunflower and wanted to buy a ticket from that point through Clarksdale to Hollywood, and have her baggage checked through to the latter point. When she asked the agent for a ticket, she told him she wanted to check her baggage through to Hollywood, when he told her that he could not check it

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through to Hollywood, and could only check it to Clarksdale, at which place she would have to get another ticket and re-check her baggage to Hollywood. For some reason, not explained, while the defendant company owns the lines of railway that run from Sunflower past Clarksdale to Hollywood, yet its agent would not check her baggage through from Sunflower to the latter place, and so informed her. It does not appear that he could not, or would not, sell her a ticket through from Sunflower to Hollywood. She bought a ticket to Clarksdale, and sometime after dark that evening, went aboard one of defendant's trains and was carried from Sunflower to Clarksdale, arriving at the latter point sometime after nine o'clock.

It seems she did not check her baggage at Sunflower, which was a suitcase, but carried it in her hand on the train. When she arrived at Clarksdale she went into the station house, and told the agent that she wanted a ticket to Hollywood. She testified the agent said: "Lady, you cannot go over to Hollywood until 6.50 in the morning, but I can sell you a ticket and check your baggage all right." She says she then bought the ticket and checked her suitcase and kept her sample case with her. After buying her ticket and checking her suitcase, she then asked the agent if it would be all right for her to stay in the depot that night and until the train for Hollywood reached there the next morning, when the agent replied: "That was what it was built for; that was what it was for."

She remained in the waiting room of the station house some time until the next morning, when the train for Hollywood reached Clarksdale. There were six other persons in the waiting-room during the night, two of them being old gentlemen. There was no fire in the room. It grew cold about eleven o'clock, when she began to suffer from the cold. After being in the waiting-room about an

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hour and a half or two hours, she went to the agent, from whom she had bought the ticket, and asked him to build a fire in the stove, when he replied: "I will have one built right away." He failed, however, to have the fire built, and about two o'clock, as her suffering was greater on account of the cold room, she again went to the agent and told him she was cold, calling his attention to the fact that she was hoarse, and said: "You see I am sick. I want you to have a fire built." And he told her he would have that done immediately. This was about two o'clock in the morning. She testified that she again went to the agent after 3.30 in the morning, and told him no fire had been built, when he promised her again to do so in a few minutes, but did not build a fire until a short time before her train left at 6.30 in the morning, and when she left the fire was not burning well.

When she reached Clarksdale, she testified that she was sick, and that she contracted a cold while in the station house, growing so hoarse that she could hardly speak above a whisper, and, after getting on her train for Hollywood, she became deathly sick, and she decided not to go to Hollywood, but to go to Dyersburg, Tennessee, where she had friends, and with whom she could stay without it costing her anything if she should become seriously ill. The conductor re-checked her suitcase for Poplar Street Depot at Memphis, and she went to that point. That afternoon between three and four o'clock she took train at Memphis for Dyersburg, reaching that place about eight o'clock that night.

With the exception stated, she said her health had been good, and was good at the time she was at Clarksdale and contracted the severe cold in defendant's waiting-room at that point; that her sickness had then been on her about twenty-four hours, and the cold she contracted in the sta-

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tion just stopped everything, and caused her throat to rise and become very sore before daylight the next morning. When she reached Dyersburg, she consulted a physician about her condition. Her throat had become so sore that the doctor thought her tonsils would probably rise, and they did, and in about eight or nine days thereafter burst. He prescribed for her and relieved her pain to some extent. Once a month, ever since the time she contracted the cold in defendant's station at Clarksdale, her tonsils become sore, swollen, and burst, and is not only exceedingly painful, but the odor caused by the rising and bursting is very offensive.

This case was tried November 17, 1913, or a little more than a year after she was at Clarksdale, and contracted the cold, and once a month since then, during her sickness, her tonsils have swollen to such an extent that they burst, being very painful, and also very offensive. About a month after she was at Clarksdale, she consulted an eminent specialist in Memphis about the condition of her tonsils, who advised that they be cut out; but she gives as a reason for not doing so, that she was not financially able to pay for the operation. There can be no doubt this woman suffered greatly once a month on account of her sore and swollen tonsils, and that this was caused by the cold waiting-room she was compelled to occupy at Clarksdale.

It appears that the Legislature of Mississippi has enacted the following law: "Every railroad shall keep rooms open for the reception of passengers, at all passenger stations, at least one hour before the arrival, and a half hour after the departure of passenger trains; and that all reception rooms shall be made comfortable, and shall be kept in a cleanly and decent condition, and properly heated when necessary, and properly lighted at night. The agent, or person in charge, shall preserve order, and, if necessary,

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eject any person whose conduct is boisterous or offensive." The record shows that, on the night in question, in the waiting-room for the colored passengers, there was kept a good, warm fire; while in the waiting-room where this lady, and the other white passengers remained, there was no fire in the stove at any time while she was there, until a short time before her departure at 6.30 the next morning. The defendant company examined two witnesses who were in its ticket office on the night of the 26th of October, one the fore part of the night, and the other from twelve o'clock until eight o'clock the next morning. These two witnesses contradict the testimony of the plaintiff and her witnesses about the purchase of a ticket by her and the checking of her baggage. They deny that she asked them, or either of them, to make a fire in the stove, as she and her witnesses testify, and that being an issue between them on material points, it was proper that the case go to the jury to settle these questions of fact.

Defendant's learned counsel, however, insists that, under the law of Mississippi, quoted *supra*, the company was only required to keep its waiting-rooms open and comfortable one hour before the arrival of passenger trains, and a half hour after their departure; that under the Mississippi law the company was not bound to make a fire in the stove in its waiting-room so as to render it comfortable, except an hour before the arrival and half hour after the departure of each passenger train. The logic of the position assumed by counsel is, that no matter how many passengers may be detained at Clarksdale, awaiting a train to carry them away, the company is not required to keep its waiting-rooms comfortable, except the short time mentioned, before and after the arrival and departure of its passenger trains. As we construe the law of Mississippi, the railroad company is compelled to keep the rooms open for

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the reception of passengers, one hour before the arrival, and a half hour after the departure of passenger trains. The first part of this law provides for keeping the rooms, for the reception of passengers, open a certain length of time. During that time the agent of the company cannot lawfully close these rooms, as the law requires them to be kept open. This law goes further than that, and provides that "all reception rooms shall be made comfortable. . . . and properly heated when necessary," the meaning of which must be that, when used by passengers, or persons intending to become passengers, they must be made comfortable, and properly heated when necessary.

It appears from the testimony of Mrs. Tully that, after her arrival at Clarksdale, she bought a ticket from the agent, which entitled her to carriage from that point to Hollywood. She then had her suitcase checked to the latter place. When she bought the ticket, she then became a passenger. According to all the authorities, after a person has bought a ticket which entitles them to ride on the company's trains, that person then becomes a passenger, and, while in the waiting-rooms, that person is entitled to the protection of a passenger. According to Hutchison on Carriers, it is the duty of the railroad company to provide comfortable rooms for the accommodation of passengers while waiting at the stations; and this was so held by Chief Justice Dillor, in the case of *McDonald v. Railroad*, 26 Iowa, 124, and is laid down as the rule in section 516, 2 Ed., Hutchison on Carriers. After Mrs. Tully bought her ticket, she asked the agent if she could remain in the waiting-room, and he told her that was what it was built for, and being so assured, she stayed there until the next morning. Not only she, but five or six other persons remained in the waiting-room during the night. It may be conceded the company had the right to close its waiting-room a half

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hour after the train left, and not open it again until one hour before the arrival of the next passenger train, but this right, or privilege, it failed to exercise, but kept the room open for the accommodation of these persons, and expressly for the benefit of the plaintiff, assuring her at the time that it was built for that purpose. Having kept it open, and having informed her she might remain there until the next morning, and having sold her a ticket to ride on its trains from that place to Hollywood, it seems to us that the defendant owed her a duty to keep its waiting-room in a comfortable condition while she stayed there, awaiting the arrival of her train.

The cases which learned counsel for the railroad company cite, are those where the company told the waiting passenger that he would have to get out of the station and find a place elsewhere to await the arrival of the train, and, after putting such waiting passenger out of the station, closed it, as it had a right to do under the law. It is true, under the common law, the company is not required to keep their waiting-rooms open all the time, as a place for passengers to wait for trains, but are only required to keep them open a reasonable time before the arrival, or after the departure of trains. There is no complaint here that the company failed to keep its waiting-room open, or that it turned this woman out into the cold night air, where she contracted a cold; but the complaint is, that they failed to keep the room comfortable and warm after telling her she could stay in it until the next morning.

The case of *Andrews v. Railroad Company*, 86 Miss., 129, cited by counsel for the Railroad Company, shows that the plaintiff went to the waiting room several hours before the departure of his train, and, that his prime object in going there was that he might have a comfortable and convenient place in which to transact the business

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of writing up his daily insurance reports. The opinion shows that "he had not, in any sense, put himself in the care of the carrier, or directly within the control, with the *bona fide* intention of becoming a passenger." On the facts of that case, the Supreme Court of Mississippi correctly decided it, but the facts of this case are quite different from those of that case. This lady did not stay in the waiting room as a matter of choice to transact her private business. She stepped from one of defendant's trains into its waiting room, and then bought a ticket from that point to another station on its line, checked her baggage to the point of her destination, and asked permission of the agent of the company to remain until the arrival of her train the next morning. She had put herself in the care of the company, and directly within its control, with the *bona fide* intention of becoming a passenger—in fact, she was then a passenger of the defendant company.

In *Phillips v. Railway Company*, 124 N. C., 123, the Supreme Court of North Carolina says: "A party coming to a railroad station with the intention of taking the defendant's next train, becomes, in contemplation of law, a passenger on its road, provided that his coming is within a reasonable time before the time for departure of said train." It is held in that case, that it is not necessary that he should have purchased a ticket, but if he came to the station with the *bona fide* intention of becoming a passenger a reasonable time before the arrival of his train, he thereby becomes a passenger of the defendant company, and entitled to its protection, care and comfort.

In nearly all the cases cited by learned counsel for appellee, it appears that the litigation arose out of the act of the agents of the company in putting the intended

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passenger, or person, out of the waiting room and closing it up in accordance with a right conceded by statute, or a right which the company had under the common law. But we have no such case as that before us. It is conceded by learned counsel for the company, that, if Mrs. Tully had bought a through ticket at Sunflower for Hollywood, and had been compelled to wait at Clarksdale for her connecting train, then she would have a good cause of action against the company for failure to keep the waiting room comfortable. We are of the opinion that she was, in fact, practically, and to all intents and purposes, a through passenger from Sunflower to Hollywood. She departed on plaintiff's train from Sunflower to Hollywood. Before buying her ticket at Sunflower, she sought to purchase a ticket and have her baggage checked through to Hollywood, but the agent informed her that he could not sell her such ticket, nor could he so check her baggage, but would sell her a ticket to Clarksdale, and check her baggage to that point, and when she reached that place she could then buy a ticket for Hollywood, and check her baggage to that station. When she arrived at Clarksdale, she at once did what the agent informed her she could do, and we think to all intents and purposes she was a through passenger, although she did not have a through ticket. The accident that she failed to have such ticket because the agent did not sell it to her, we think, does not make her any the less a through passenger. The company knew where she boarded its train, and to what point she desired to go, and whether she had a through ticket or not, she was compelled to remain all night at Clarksdale. But, even if she were not, as we think she was, a through passenger, she nevertheless became the defendant's passenger again as soon as she bought her ticket at Clarksdale, and while remaining in the station house, with

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the knowledge and consent of defendant's agent, she was entitled to the care and protection of the defendant company, and to have a comfortable, warm, well-lighted place in which to remain while waiting for her train.

It was said by the Supreme Court of Texas, in the case of *Railroad Company v. Foster*, and cited by counsel for Mrs. Tully: "When the relation of carrier and passenger is once established, it usually continues till the end of the journey, unless it is sooner terminated by the voluntary act of the passenger." In this case that relation was established at Sunflower, when Mrs. Tully bought her ticket to Clarksdale. We are inclined to think that relation was not terminated after her arrival at Clarksdale, but, if mistaken in that, the relation of passenger was again established as soon as she purchased her ticket for Hollywood, and, when re-established, she was then entitled to the care and protection of the defendant company, and to have a warm, comfortable waiting room in which to stay until the arrival of her train, and especially is this true when the company permitted her to use the waiting room as a place to stay until her train came. It is said by the Supreme Court of Texas, in the case cited: "The carrier owes the duty, even in the absence of any statutory regulation, of allowing passengers the use of their waiting room a reasonable time before and after the arrival and departure of trains, and that they would be required to permit the use of waiting rooms between trains by through passengers at junction points."

But the question of the use of the waiting room is not in issue in this case. The depot was not closed during the night, and Mrs. Tully used it with the knowledge, permission and consent of defendant's agent, and having allowed her to so use it, and in fact she had a right to do so as we think, after she became a passenger, it was

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then its duty to keep it in a warm, comfortable condition, so as not to injure her health in any respect, and failing to do so, it is liable to her for whatever damages she sustained by reason of such failure.

It is insisted by her learned counsel that the verdict returned by the jury is grossly inadequate, in so much that it evinces passion, prejudice, unaccountable caprice or corruption. The jury heard Mrs. Tully's testimony and the testimony of her witnesses, and reached the conclusion that \$500 was a fair compensation to her for the injury she sustained. In considering whether it is fair compensation or not, we cannot look to the fact that she had to bring witnesses from a distance to testify in her behalf. She recovers costs to pay the expenses of such witnesses, and the defendant is onorated with such costs. whatever amount that may be, in addition to the \$500 the jury has awarded her. Neither do we think we can consider the fact that she has to compensate her able attorney out of the amount the jury awarded her. The jury is not required to give her just and fair compensation for her injuries, and in addition to that amount, to add a further amount to cover her lawyer's fee. We do not understand that lawyers' fees, incurred in recovering compensation, is an element of damages to be recovered by her, or even to be considered by the jury. We have very carefully considered the evidence of plaintiff and her witnesses bearing upon the extent of her injury, and the effect flowing therefrom, and while it is true she says that she did not have an operation performed on her tonsils because she was not able, yet she does not say she could not get the money to pay for such operation, or that she ever tried to get it. If she had borrowed the money and had the operation performed, she would have been entitled to recover the amount paid by her for such operation, as an element of damages in this case.

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It appears from the testimony of the specialist that such an operation is not by any means dangerous, and it is probably true that it is accompanied by very little inconvenience and small suffering. What the expense of such an operation would be the record does not show. The evidence does show that an operation would remove the trouble, and if so, she should have had it performed, and thereby lessened her damages.

It appears from the evidence of herself and witnesses that her suffering was painful and unpleasant, and it also appears that it was not difficult to stop such suffering, and in view of all the facts of this case, we are unable to reach the conclusion that the verdict of the jury was so inadequate as to indicate passion, prejudice, corruption or caprice on the part of the jury. There does not appear in the record, any reason why the jury should be prejudiced against giving this woman what she was justly entitled to, or that they were, in any manner, actuated by any passion or caprice, and for these reasons we have reached the conclusion not to disturb the verdict of the jury, and it results that the judgment of the lower Court is affirmed.

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CHess-WYMOND COMPANY v. J. H. DAVIS.

Certiorari denied by the Supreme Court.
(*Nashville*. December Term, 1913.)

1. DEATH BY WRONGFUL ACT. *Suit by father to recover for loss of services of minor son who was killed.*

A parent cannot in his own name institute suit to recover for the loss of the services of a minor son between the date of his death by wrongful act and his arrival at maturity. This right of action belongs to an administrator.

2. SAME. *Suit for loss of services after injury and before death.*

But a parent may sue for loss of services from the time of an injury of his minor son up to the death of the son without qualifying as administrator; and he may also include in this reimbursement for medical expenses and nurse hire.

FROM OVERTON COUNTY.

Appeal in error from the Circuit Court of Overton County. C. E. SNODGRASS, Judge.

R. D. WHITE and PITTS & McCONNICO for Plaintiff in Error.

C. J. CULLOM and W. R. OFFICER for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS was a suit by J. H. Davis to recover damages averred to have accrued to him because of the wrongful

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killing of a minor son. There was a verdict for \$500.00. The Circuit Judge declined to grant a new trial, and pronounced judgment. Plaintiff in error prayed and perfected its appeal and has assigned errors.

The declaration contains four counts. Analyzing the first three counts, we find that they are in substance as follows: That defendant below wrongfully enticed and hired the sixteen-year-old son of Davis and took him to Arkansas and put him to the dangerous work of assisting hands in the felling of timber, and that while the minor was so engaged, a tree which other servants of defendant were cutting, fell upon him and killed him; that in consequence the father had been deprived of his services from that day until the arrival of the son at maturity; and that the father had been required to pay out large sums of money because of the death of the son; and in one count it was averred that as a consequence of the wrong the father had been deprived of the son from the date of injury until the death of the son a few days thereafter. The fourth count was in brief that the son had been wrongfully hired or enticed from the father and put to work, and that the father was entitled to the reasonable worth of the services of the son from the date of the enticement until the death of the son. This latter feature of the case was virtually lost sight of during the trial.

Learned counsel for defendant below sought to have stricken from the declaration all of the averments relating to the wrongful killing of the son in Arkansas, and all claim for lost services of the minor from the date of his death until the arrival of the son at maturity. These objections were presented in the form of a motion. The Circuit Judge declined to sustain this motion and required the parties to go to trial upon pleas which were equivalent to the general issue. His Honor, the trial

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Judge, went upon the theory that plaintiff had the right to maintain this action for pecuniary loss of earnings of the son from his death until his maturity; and that was virtually the only aspect of the case which was submitted to the jury. Counsel for plaintiff in error sought to have the Court instruct the jury that there could be no recovery for loss of services of the minor after the death of the minor, but this request was refused.

The record from the standpoint of procedure is not as clear as it should be, but we shall treat the several motions, pleas and instructions and requests to instruct as raising the simple question as to whether or not the father of a minor who is wrongfully killed may in his own name sue for the loss of anticipated services of the minor from his death until arrival at maturity.

This point has been decided virtually in this State, and it can hardly be treated as an open question. This Court so held in effect in the case of *Coal Co. v. Watts*, 1 Tenn., C. C. A., 347. We reached that conclusion, speaking through Justice Hall, after a careful consideration of the case of *Railroad v. Leazor*, 11 Cates, 1. Learned counsel for appellant, while overlooking these two authorities, have brought to our attention a case which we in turn did not ascertain to be in existence, namely that of *Hall v. Railroad*, 1 Shannon's Cases, 141. The reasoning of that case is almost conclusive of the question here. It certainly leaves little room for controversy as to the rule in this jurisdiction. We have examined the English authorities referred to, together with others, and find it to be the universally accepted rule that, in the absence of a statute saving the action, the parent has no right of action for loss of services of a minor from the date of the minor's death until maturity. It will not profit us to enter into the reasons why this rule has been adopted. It is com-

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pounded of the religion, philosophy and polity of our forefathers. The death of a human being was looked upon as the act of God or of a wicked or diabolical disposition, for which the wrongdoer must be held accountable to the Almighty or to the State. This sentiment and belief crystallized into a rule denying a civil right of action for the killing of anyone; and this rule became so hard and fast as a part of the common law as to be in force today except as modified by statute, and to the extent only that statutes clearly change the law.

See 3 Street on Foundations of Liability, 73, 74. See also the case of *Stevenson v. Lumber Company*, 18 L. R. A. N. S., 316, and cases there cited, and *Edgar v. Castello*, 37 Am. Report, 714; also *Railroad v. Kirke*, 90 Pa. State, 15.

Such was the universal rule until the passage of Lord Campbell's Act, near the middle of the nineteenth century. By this Act, which was copied with some amendments by the Legislature of Tennessee, the right of action for injuries which result in death which would otherwise abate was in a manner preserved. These statutes, sections 4025 to 4029, of Shannon's Code, afford a parent a right of action for the negligent killing of his minor child; but before such suit is brought, even for loss of anticipated services, the father must either himself or have someone qualify as administrator of the deceased child: *Holston v. Coal Company*, 11 Pickle,, 521; *Coal Co. v. Watts*, *supra*.

It is said by learned counsel for defendant in error that this is a new, strange and unwarranted construction of our statutes and of the common law. It is not new. A more apposite reply to this contention is one to the effect that our statute, to which plaintiff below must go for the maintenance of his right of action, expressly pro-

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vides and requires that a certain mode of procedure be observed when it is sought to recover for damages growing out of the wrongful killing of another. In the case at bar, the parent is undertaking to recover for damages which resulted to him by the wrongful killing of his minor son—that is, for his disappointment in failing to receive the pecuniary aid to be expected from the survival of the son until maturity. It is therefore plain that the damages sought are those growing out of the wrongful death of the son; and it is equally plain that he cannot in his own right maintain an action therefore. His remedy is to qualify as an administrator of his son, and bring suit to recover the pecuniary value of his life. *Railroad v. Kirke, supra.*

But the maxim, *actio personalis moritur cum persona*, has no application to the case of the parent who is suing for the services of a minor son who has been killed, where recovery is sought for services from the date of injury to the date of death, and for medical and nursing expenses. This is purely a personal right of action which is unaffected by the intervening death of the child. The authorities to which we have referred recognize this distinction.

Insofar as Davis seeks recovery for the services of the minor antedating his death, he had and still has a standing in Court; and we are of opinion that he should be permitted to have another trial of his cause upon this, the only proper and legitimate issue presented by his pleadings. The learned trial Judge stated substantially the correct rule with reference to emancipation, and upon another trial he will as a matter of course be guided by the same principles.

The judgment of the lower Court will be reversed and the cause remanded for a new trial not inconsistent with this opinion. Appellee will pay the costs of this Court.

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C. H. DAVIS v. FERRO CONCRETE COMPANY.

1. MASTER AND SERVANT. *Vice principal becoming fellow-servant.*

If a vice principal, abdicating his place as foreman, engages in the actual work assigned to a servant, and while so doing negligently injures the latter in handling the instrumentalities of the master, the master is not liable therefor.

2. SAME. *Safe place. Changing conditions. Details of the work.*

The rule requiring the master to exercise reasonable care and foresight in providing a safe place in which his servants are to work has no application to changes brought about as a necessary incident of the work and as the work progresses nor to details of the work, the developments of which are to be looked after by the servant.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Division No. 1. J. P. Young, Judge.

ANDERSON CRABTREE for Plaintiff in Error.

METCALFE & METCALFE for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS suit was brought to recover damages for an injury received by the plaintiff while working for the defendant on the front part of a house on Madison Street in Memphis. At the time plaintiff was injured he was at work upon a scaffold on the front and outside of the building, which place, it is alleged, was dangerous and unsafe, because there was no means of protection of plaintiff from the

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falling and flying chips and parcels of terra cotta, one of which, falling from above him, hit plaintiff on his right hand and cut the artery, on account of which he suffered great pain, loss of time, etc. It is alleged that the place where plaintiff was at work on the scaffold was a dangerous position, though at the time its danger was unknown to him, and of which danger the defendant failed to warn him. The case was tried before a jury, who found in plaintiff's favor and returned its verdict for \$161, on which judgment was rendered. Before the case went to the jury defendant moved for a directed verdict, which motion was overruled, when the case went to the jury with the result stated above. After judgment was rendered upon the verdict, defendant then moved to set the judgment aside, and asked for a judgment in its favor dismissing the case, notwithstanding the verdict of the jury. The trial Judge sustained this motion, set aside the judgment in favor of plaintiff, and entered a judgment for the defendant dismissing plaintiff's suit, and from this action of the trial Judge plaintiff appealed and has assigned errors.

The evidence heard in the lower Court is brief, and is as follows: On the 20th of March, 1912, the plaintiff, who was a brick layer, was employed by the defendant to work on what is called the Kraus Building in Memphis, where they were putting in an enamel front to the building which consists of terra cotta. Plaintiff's brother, Ed Davis, was foreman, and had control of the brick and terra cotta work. The plaintiff was sent by his brother to work on a scaffold, pointing up the terra cotta. This scaffold was, as we understand, placed about the second story window, and extended east and west from one side of the house to the other. Plaintiff began work on the west end of the scaffold, while a man by the name of Dorrity began work on the east end of it, and as their work

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progressed they approached each other toward the center of the scaffold. Plaintiff had been engaged in this work from forty minutes to one hour, and claims not to have known any one was working above him during this time. His brother, Ed Davis, was also engaged in the same character of work at the front windows to the story or floor above plaintiff. It seems Ed Davis began to work at the windows above the man Dorrity, near the east side of the building, and worked from window to window until he reached the window immediately over where plaintiff was working. All three of the men were engaged in the same kind of work, pointing up the terra cotta, and in doing this with a hammer and small chisel, small particles of terra cotta would fly off, some of which were as large as hickory nuts, but were of different sizes. While plaintiff was at work on the scaffold and his brother at work at a window above him, both engaged in the same character of work, a piece of terra cotta was knocked off by plaintiff's brother above him, fell down and cut the artery on one of his hands, as we have stated. It seems that terra cotta is as brittle as glass and about as sharp as glass when it is broken or knocked off, as these men were doing at the time. Plaintiff was employed by his brother, Ed Davis, to work on this building, which had been in course of construction for some time, and which was not, at the time he received his injury, completed or finished. They were working on the front part of it, finishing it up, and each engaged at work on different parts; the foreman, Ed Davis, working at the window above plaintiff and Dorrity, and at the time plaintiff received the injury, he was working at the window immediately below him. The authority the foreman, Ed Davis, had, or the control he exercised, or had a right to exercise over the plaintiff, is not very clearly shown, but it

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does appear that he told plaintiff to do the work he was engaged at when he was hurt, and after telling him and Dorrity to go upon the scaffold and do this work, he went to the story above them and began work at the east side at the window above Dorrity, and continued to work from that window west, until he reached the window above plaintiff, when one of the pieces of terra cotta that he knocked off with his mallet or chisel, fell upon plaintiff's hand and cut an artery. While plaintiff says his brother employed him to work on this building, and that they had done some of the work themselves; and while he also says that his brother was foreman and had control of the brick and terra cotta work, and sent him with another fellow upon the scaffold to point up the terra cotta, yet it is not very clear just what authority, further than giving directions as to what work plaintiff should do, the foreman, Ed Davis, had over the plaintiff or Dorrity. The plaintiff testified that he had no knowledge that his brother was at work above him, while the witness, Dorrity, seems to have known all about it, and said that the pieces of terra cotta were falling all around him from above where the foreman was at work. The plaintiff testified that there was considerable noise during the time he was at work, and we infer this statement was made as a reason why he did not hear or know his brother was at work above him. His counsel insists it was the duty of the defendant to furnish him a safe place to work, and that it failed to do so, and further it failed to warn him of the dangers of some one working and chipping off the terra cotta above him, and because of these acts of negligence he has a right to recover in this action. The defendant insists that plaintiff's brother, even conceding that he was a vice-principal with all the authority of such person and representing

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the master in the work, yet that when he began to do the same character of work the plaintiff and the other man were engaged in, he then became a fellow servant, and continued such during all the time he was at this work, and also a fellow servant at the time plaintiff received his injury, and the injury having been inflicted by a fellow servant, the defendant company is not liable, inasmuch as the plaintiff, when he began work for the defendant assumed all the risks of danger that were patent and obvious, as well as risks of danger resulting from the negligence of a fellow servant.

It was said by Mr. Chief Justice Shields, in *Railroad v. Baldwin*, 113 Tenn., 414: "A vice-principal may at times lay aside his official character and engage in the common service with the other servants of the employer over which he has control, and that his acts and negligence, while thus engaged, are those of a fellow servant, for which the employer is not ordinarily responsible; but he cannot act in both capacities at the same time, and, in order to exonerate the employer, the service or act in performance of which he is engaged, must be strictly that of a fellow servant, and not one which it is his duty to do, or which he may do, as a superior or vice-principal." This doctrine is sustained by the case of *Allen v. Goodwin*, 92 Tenn., 386; *Railroad v. Bolton*, 99 Tenn., 274; *Gann v. Railroad*, 101 Tenn., 380.

In this case the foreman, Ed Davis, was not at the time plaintiff received his injury, acting as a superior or a vice-principal, but the service he was then performing, or in which he was at the time engaged, was strictly that of a fellow servant—that is, he was then doing the same kind of work the plaintiff and Bob Dorrity were engaged in, and had been thus working for nearly or about an hour before plaintiff was injured. As a vice-

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principal it was not his duty to do the work the servants under him were employed to do, and as such superior it was his duty to control, order and direct the other men how to perform their work, when to do so, and, in fact, to have superior control over them while engaged in their work. He had abdicated his office of vice-principal, or as representative of the master, and placed himself upon a level with the servants actually engaged in doing the work, and took part in its performance. We are therefore of the opinion that while so engaged, the foreman was a fellow servant of the plaintiff, and for his negligence while doing the work of a fellow servant, the master is not responsible.

It is, however, insisted that as the place where plaintiff was at work was dangerous, of which fact he was in ignorance, there was an absolute duty resting upon the master to warn him of the danger, or to protect him from injuries resulting from an unknown danger above him, and this it is insisted the master failed to do, and for such failure, the master is liable. The defendant, however, insists that, in this case, the master was not bound to furnish the plaintiff a safe place to work, but the principal invoked is applied where the place to work is a permanent one, and not to such places as are constantly shifting and being changed from time to time as the result of the employe's labor.

It was stated in *Heald v. Wallace*, 109 Tenn., 364, that as a general rule it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his labor, but this rule does not apply to cases in which the work the servants are engaged in, consists in making dangerous places safe, or in constantly changing the character of the place for safety as the work progressed. The duty of the master does not

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extend to keeping such a place safe at every moment of time as the work progresses. When the servant engaged in the work of making a place that is known to be dangerous, safe, or any work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the danger and the increased hazard of the place made dangerous by the work, are the ordinary and known dangers of employment which the servant assumes when he enters the masters' employment. The place where plaintiff was at work when he received his injury was not in any sense a permanent place of work, "but was a place in which the surrounding conditions were constantly changing, and instead of being a place furnished by the master for the employe, within the spirit of the decisions referred to, it was a place that was constantly changing from one part of the building to another. As soon as work was done on one part of the building, plaintiff's place of labor was transferred to another part. He began work at this particular time on the west end of the scaffold and moved eastward, and when that labor was finished he would necessarily have moved to some other part of the building, and the master is not required, every time his place of work changed, to see that he has a safe place in which to do it.

It is said by the Supreme Court of Pennsylvania, in *Durst v. Carnegie Steel Company*, 173 Penn., 162: "Where the place, as it stands when the work begins, is perfectly safe, and the dangers can only arise as the work progresses and is caused by the work being done, it is not the duty of the employer to stand by during the progress of the work to see when a danger arises." The place where plaintiff began work was perfectly safe at the time he went on the scaffold, and it only became dan-

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gerous as the work progressed, which danger was caused by the work that was being done above him.

In *Mayher v. McGrath*, 58 N. J. L., 469, the Supreme Court of New Jersey said: "One indicium of a detail is that the appliances are not permanent, but temporary and moveable, to be altered as the work progressed by the workmen themselves as their needs required."

In *Folly v. Brooklyn Gaslight Company*, 41 N. Y. Supp., 66, it is said: "The cases in which this principle is most usually applied, are those involving the various kinds of construction work, where the conditions in the place of work are created by the workmen themselves as the work progresses, and where the conditions are continually changing in the course of the work."

In *Armour v. Hahn*, 111 U. S., 313, the Supreme Court of the United States said: "The obligation of a master to provide reasonably safe places and structures for his servants to work upon, does not impose upon him the duty, as towards them, of keeping a building which they are employed in erecting, in a safe condition at every moment of their work so far as its safety depends upon the due performance of that work by them and their fellow servants."

It appears from the proof in this case that the plaintiff and others had been at work for some time, perhaps a month or more, in constructing that particular building, and, of course, necessarily worked on it in many different places, in each of which there was more or less danger. It was almost impossible to make each one of these places a safe place to work, and probably the only way it could have been done would have been for the master to have some one constantly on the lookout, or watch, to discover when a place of work became dangerous and unsafe, and at once to make it safe for the servant. The law does

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not impose such stringent duties upon the master as to require him to constantly keep such a lookout. The servant, when he engages to work on such building, knows his work will constantly change from place to place, and he likewise knows the difficulty of keeping each one of the places where he works altogether safe; and having this knowledge, he is presumed to assume the risk of working in or on such dangerous places while aiding in the construction of the building, or other like character of work.

We are of the opinion that the work in which plaintiff was engaged at the time, was such that the master was not obligated by the law to furnish him a reasonably safe place to work; that it was not a permanent place of work, but one constantly shifting and changing from one part of the building to another, and for that reason the master did not owe him the duty of furnishing him with a safe place to work. This Court held at its last term in Knoxville, a case which was appealed from Hamilton County, where one servant was working on the top of the building and the plaintiff on another part of it lower down, and the servant on top threw a piece of scantling or lumber of some kind from the top down on the plaintiff, seriously injuring him, that the doctrine of a safe place to work did not apply, and the holding of this Court was affirmed in that case by the Supreme Court at its last session in Knoxville.

We have reached the conclusion that the motion for peremptory instructions should have been sustained by the trial Judge, and that there was no error in setting aside the judgment in plaintiff's favor, and entering a judgment for the defendant dismissing the suit, and the action of the Court in that respect is affirmed with costs.

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D. R. TOWNSELL v. L. & N. RAILROAD COMPANY, ET AL.

Writ of certiorari denied by Supreme Court.

(*Jackson*. April Term, 1912.)

1. MALICIOUS PROSECUTION. *Termination of suit. Search warrant.*

There is sufficient termination of suit to authorize the bringing of an action of malicious prosecution where a search warrant issued against plaintiff was executed and returned by the officer with the statement that no property had been found upon the premises of the plaintiff.

2. SAME. *Pleadings. Action on the facts.*

The defendant to a search warrant may bring his action for damages upon the facts of the case and recover in an action partaking of trespass and slander.

3. SAME. *Railroad companies. Liability for acts of agent in suing out search warrant.*

A station agent of a railway company may be found to have authority express or implied to sue out search warrants for the recovery of property stolen from cars within the station grounds, and the railway company may be held liable in damages for the wrongful and malicious exercise of this power.

4. SAME. *Question of law or fact.*

Whether the station agent has this power is one compounded of law and fact and must generally be determined by the jury under appropriate instructions.

FROM GIBSON COUNTY.

Appeal in error from the Law Court at Humboldt. T.
E. HARWOOD, Judge.

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J. D. SENTER and HAL HOLMES for Plaintiff in Error.

McFARLAND & BOBBITT for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

PLAINTIFF in error, whom we shall call the plaintiff, instituted this suit against the railroad company and one Passmore, whom we shall call defendants, for damages for the wrongful and malicious suing out of a search warrant. The declaration contained two counts. The defendants demurred to the declaration as a whole. The Court sustained the demurrer as to the second count, and the parties went to trial upon the first count under a plea of not guilty. At the conclusion of the testimony defendants interposed motions for a directed verdict. One ground urged was that the plaintiff had failed to show that the proceeding which was the foundation of his suit had been terminated. The other reason urged for peremptory instructions in favor of the railroad company was that there was a failure to adduce any evidence which would justify the submission to the jury of the question as to whether the parties acting for the railroad company had authority to represent it in the premises.

The learned trial Judge was of opinion that the suit would have to stand dismissed because of failure to show termination of the litigation. But he expressly stated that there was evidence of want of probable cause upon the part of Passmore, and that but for the technical ground of failure to show termination of suit he would have submitted the issues to the jury. With respect to the railroad company, His Honor was of opinion in addition that there was no evidence that its agents could bind it in the premises.

Plaintiff excepted and also entered a motion for a new trial. This motion was overruled, and thereupon plaintiff

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prayed and perfected his appeal and is in this Court assigning one error.

The questions presented have been found to be very interesting, and the briefs in support of and in opposition to the assignment of error have been quite entertaining. We have reached the conclusion after a most careful consideration that the learned trial Judge was in error upon both of the reasons assigned by him, and that he should have submitted the case with respect to both defendants to the jury.

1. As regards the view of the trial Judge that it was incumbent upon the plaintiff to show a termination of the litigation, there are in our judgment two conclusive answers. The first count of the declaration (and we shall not regard the second one, as it went out of the case upon demurrer, action on which is not here assigned as error) was a very succinct statement of the facts of the case. The substantive averments were that the defendants had wrongfully, falsely and maliciously and without probable cause procured the issuance of a search warrant under which the house and premises of the plaintiff, an innocent and reputable citizen of Humboldt, had been searched for meats which it was claimed had been stolen from a box car in the yards and in the possession of the defendants at Humboldt, and that when said premises were thus searched the officer ascertained and returned that no property had been found and that as a matter of fact no property was or could be found; and that in consequence he had suffered disgrace, humiliation, etc.

It should be noted that the declaration does not disclose the institution of any criminal proceeding by way of indictment or warrant other than that suggested by the search warrant; and it was developed by the testimony that no criminal proceeding of any kind or any additional step

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looking to further proceedings or further prosecutions was taken after the return of the search warrant to the justice who had issued same.

It is the uniform rule in cases of malicious prosecution that plaintiff must not only show termination of the litigation, but that it was ended in his favor. *Swepton v. Davis*, 1 Cates, 99. But if it be conceded that plaintiff's present action was one for malicious prosecution, we are of opinion that he brought himself within the rule by alleging and proving that no property had been found by the officer when his premises were searched, and that the warrant had been returned to the Court issuing the same with the official statement to this effect. Such return of the officer is a termination of the search warrant litigation so far as the defendant therein is concerned, saving and reserving of course to the parties procuring the issuance of the warrant the right to show that, notwithstanding the failure to find any property, it was issued with probable cause or without malice. *Spangler v. Booze*, 1 Ann. Cas., 995; *Anderson v. Cowles*, 77 Am. St. Rep., note; see also *Chipman v. Bates*, 40 Am. Dec., 663.

We have critically examined the statutes of our own State regulating the suing out and executing of search warrants, condensed in sections 7300 *et seq.*, Shannon's Code, and find nothing therein which even remotely suggests that when no independent criminal proceeding has been instituted against the defendant, and when the search warrant has been returned with the statement that no property has been found, the defendant therein has any right or is required to appear before the Court issuing the writ and demand a trial upon any issue. We are unable to conceive any ground upon which it can be said that the proceedings so far as the defendant is concerned are not terminated by the return of the officer that he had searched the

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premises and had found thereon none of the property described in the warrant. We reiterate our conclusion that such return amounts to a termination of the litigation and a discharge of the defendant therein in such manner and to such extent as to enable him to institute suit for the alleged wrongful suing out of the process.

But as a matter of fact this suit should not be regarded as a technical action for malicious prosecution either by statute or by common law rule. It should be looked upon as an action upon the facts for the redress of wrongs. It should be treated really more as an action of trespass, a suing for a wrongful entry upon and search of one's premises in an aggravated and offensive manner, with the implication that the party had committed the crime of larceny or of receiving stolen goods. *Chipman v. Bates, supra*; 35 Cyc., 1276. It might to some extent also be looked upon as an action of abuse of process, in which action it is unnecessary to show a termination of the original litigation if it be shown that no property was found under the search warrant. So that whether it be regarded as an action of malicious prosecution pure and simple, or as an action of trespass, or an action for malicious abuse of process, we are unable to discover any technical rule which will debar plaintiff from going to the jury on his issues. See the interesting note appended to the case of *Railroad v. Holladay*, L. R. A., N. S., 205; also 32 Cyc., 542; *Sneeden v. Harris*, 14 L. R. A., 389; *Pope v. Pollock*, 4 L. R. A., 456; 25 Cyc., 57; and our own cases of *Smith v. Aiken*, 2 Sneed, 457; *Sloan v. McCracken*, 7 Lea, 626, and *Swepton v. Davis*, when properly analyzed, sustain this view.

It is evident from the foregoing that His Honor committed error in sustaining the motion of defendant Passmore, and that as to him the judgment must be reversed and the cause remanded for a new trial. The case as

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against the railroad company presents more difficulty, not upon the point of the failure of the plaintiff to show termination of the litigation, but upon the point as to whether there was evidence upon which any judgment whatever against the railroad could be predicated. The learned trial Judge evidently took the view that the representatives of the railroad were acting upon their own initiative and beyond the scope of their authority, and that they could not bind the railroad company in the premises.

2. Plaintiff introduced evidence tending to prove that one Gatewood was the station agent and general representative of the railroad company at Humboldt, having charge of the station, station grounds and freight yards, and the care and custody of all freight and freight cars stored or placed in or about the depot or upon the yards, and that it was his duty to look after, control and protect the property of the railroad company and of its cutsomers; and, further, that all employes of the railroad company at that place were under his supervision and control. There was also adduced evidence that a box car within the yards of the company at Humboldt was broken into in January, 1913, and a quantity of meat stolen therefrom and carried away; that this theft had been discovered by defendant Passmore, and had been communicated to Gatewood with the intimation that the plaintiff had participated in the theft, or that some of the property could be found upon the premises of the plaintiff; that very early in the morning after the night of the alleged theft, Passmore, Gatewood, and an officer met at the office of a justice of the peace in Humboldt and procured the issuance of the search warrant in question, after some discussion as to the advisability of issuing the same, Passmore making the affidavit which preceded the issuance of the warrant. We do not think it material at this point to dwell upon the fact that Gatewood declined

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to sign the affidavit or to mention the fact that he asserted his belief on Townsell's innocence. There was at least evidence tending to show that he either acquiesced in the suing out of the process against Townsell or did not object thereto when he had it in his power absolutely to forbid the suing out of the process. It is clear at all events that he could have prevented the issuance of the warrant. Not only that, but there was testimony upon which the jury could infer that he really procured the issuance of the warrant, but declined to make the affidavit, leaving that to be performed by Passmore.

The recitals immediately above were and are such as to make it a disputed question of fact as to whether Gatewood did actively or in effect order the issuance of the process. It was not proper to take his assertion as conclusive upon the jury. It is well in this connection to remark also that while Gatewood denied emphatically the possession by him of any authority to issue or to have issued the search warrant, the question as to whether he did have such authority was at least one for the jury and not for himself to determine. He might state that he had no special instructions or no special authority, but whether he had general authority to and did so, or whether this act came within the scope of his authority as representative of the corporation was a question of fact at least. Under certain circumstances the power of agents thus situated could be passed upon as a question of law, but we have chosen for the purposes of this case to treat it as one of fact to be passed upon by the jury under proper instructions.

Our own case of *Eichengreen v. L. & N. Railroad*, 12 Pickle, 229, should be mentioned as authority for the proposition that railroad companies may be held liable for malicious prosecutions instituted by their agents, and

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that it is unnecessary, in order to recover against them, to show that the agents who instituted the malicious suits were specially authorized to do so. This case is likewise a supporter of the proposition that railroad companies may be held liable for wrongs of this nature inflicted contrary to specific directions and over their protest if the agents at the time acted within the apparent general scope of their authority and for the benefit of their employers.

It is well at this juncture to premise that there was evidence upon which the jury could find that the search warrant was sued out for the purpose of recovering and restoring to the railroad and to Gatewood the possession of property which had been stolen. There was likewise evidence from which it could be inferred that Gatewood and Passmore were resorting to this process in lieu of a replevin writ and for the specific purpose of protecting the special property of the railroad company in the meat and of saving the railroad company from accountability to the owner. It need hardly be said in addition that the jury could well infer that Passmore and Gatewood were prompted by a desire to protect and promote the railroad's business and interests, and that they were not acting from private or personal motives or from a sense of duty owing by them to the public. And herein is found a distinction which should always be kept in mind in passing upon the question as to whether the instituting of proceedings by servants was within the scope of their authority.

If it is evident that the servant is acting from private and personal motives, then the liability of the master must be determined on the narrow basis or view as to whether the act was *clearly* within the conferred or general powers and scope of employment of the agent.

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But this is not always the test. For however malicious and personal and willful may have been the act of the servant in inflicting the wrong, the master will be liable if the agent acted within the scope of his employment. In addition, if the servant inflicts the wrong willfully, deliberately and maliciously, and yet does it because he deems it to the interest and for the profit or promotion of the business of his employer, the latter will be liable if the act be within the ostensible power and scope of the employee: *New York Central Railroad v. U. S.*, 212 U. S., 491; 53 L. Ed., 624. The cause just cited is likewise an authority for the proposition that if a corporation vests an agent with general powers or general duties and leaves to him really or *apparently* the determination of the question as to whether a certain course of procedure should be followed, the corporation is always liable for the judgments and acts of the agent done within the apparent scope of those powers, although unusual. It is remarked in the case just referred to that owing to the multiplied activities of corporations, public policy demands that their liability be extended so as to enable all parties who deal with the corporate agents to have redress for any injuries inflicted by those agents within the general or apparent scope of their authority.

Another distinction that should be adverted to is that if it be conclusively shown that the agent is acting from motives of his own, whether for personal gain or revenge, or from a sense of public duty, with respect to the prosecution of criminals, the master will rarely ever be held liable. But when the servant assumes to or really does act for the master, taking those steps which he deems to be for the master's benefit, then the question of non-liability can seldom be determined at once in favor of the master. This is especially so with respect to custodians

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or bailees of the property of their masters charged with the specific or general duty of caring for it and determining from time to time methods and means of preserving the things committed to their care. Authorities are quite numerous that when such is the case a jury might infer the vesting of the agent with the power to institute civil or criminal proceedings for the purpose of recovering the possession of property or of protecting property, the possession of which is assailed. See *Railroad v. Holladay*, 39 L. R. A. N. S., 205, and cases cited in the opinion, and also in the subjoined note; also the following: *Jackson v. Telegraph Company*, 70 L. R. A., 739; *Markley v. Snow*, 67 L. R. A., 683, with special reference therein to English authorities; *Wheeler & Wilson v. Boyce*, 59 A. Rep., 571; *Cameron v. Exp. Company*, 48 Mo. App., 99; *Railroad v. King*, 66 Miss., 852; *Staples v. Schmid*, 19 L. R. A., 824; *Richie v. Warner*, 27 L. R. A., 163; 31 Cyc., 1405, 1585; 38 Cyc., 1041; 10 Cyc., 1217; *Johnson v. Chicago, Etc., Railway*, 130 Wis., 492; 110 N. W., 424, wherein it was held that the jury might infer power to order arrests or bring suits by an agent charged with the duty of looking after and protecting the property of his master. See, also, *Railroad v. Ennalls*, 16 L. R. A. N. S., 1100. There will be found in the greater portion of the authorities just mentioned special reference to the case of *Edwards v. London, Etc., Railway Company*, and *Allen v. same railway company*, English cases, reported in 6 Q. B., 65, wherein Justice Blackburn clearly stated the rule to be that a jury might infer from the general duty conferred upon the servant to care for and protect the property of his master the power to institute civil or criminal proceedings, if done for the specific purpose of promoting the master's business and of protecting his property. The rule deducible and justifiable from the fore-

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going is that the Court should submit to the jury the question as to whether or not the servant who is custodian of property and charged with the duty of protecting the same has implied power or authority to institute search warrant proceedings or criminal proceedings when done for the purpose of recovering possession and of protecting the property of the master; and we are of the opinion that the learned trial Judge was in error in failing to keep this distinction or this foundation of liability in mind. It might be well to remark right at this point that this affords guides or lights by which a number of cases which are apparently in conflict can be reconciled. That is to say, if the property is forever gone and can by no possibility be recovered, and if the acts of the agent can under no conceivable phase have been performed for the purpose of recovering the property, the master can seldom be held liable. But if, on the other hand, the servant pursues that course which he deems promotive of the master's business, then the question of authority becomes a debatable one at least. We shall not analyze the many authorities above cited, in any other way than to say that they have a direct bearing upon the distinctions above pointed out and that they sustain the position of the learned counsel for plaintiff that if Gatewood was clothed with the duty of caring for and protecting the property of the railroad company, and if he as such agent caused or procured or suggested the issuance of the search warrant for the purpose of restoring the property to the railroad company, then the question as to whether his act was within the scope of his authority or power should have been left to the jury. Our own early case of *Luttrell v. Hazen*, 2 Sneed, 20, is, in our judgment, pertinent. It was there laid down in a brief but very logical way that the master would be liable for the act of the servant if the particular

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act might fairly be held to be included in the general powers or the apparent scope of the powers or directions with which the master has clothed or has given the servant. With respect to this question as to whether the act of the servant might fairly be included in the powers conferred the discriminating remarks of the annotator in the case of *Richie v. Warner, supra.*, are relevant. It is stated that the master should be held liable for acts done by the servant within the apparent scope of the agent's authority if it was likely or probable that such acts would be pursued by the servant: *T. & P. Railroad Company v. Parker*, 68 S. W., 831. This last cited case is an instructive one and should be considered as in line with that of *Railroad v. Holladay, supra.*, and as supporting the proposition that a jury might infer from the mere fact that the railroad station agent represents the railroad generally and is in duty bound to protect property in its custody and that he has implied power to institute possessory actions or other proceedings as one of the methods or means of exercising the powers with which he had been vested by the master. This case should also be considered in connection with some parts of the reasoning of the case of *Markley v. Snow, supra.*, to the effect that the custodian of personal property may resort to process for the purpose of recovering possession of property for the master. All these cases should be considered with that of *Chipman v. Bates, supra.*, and with the generally accepted belief that a search warrant may be resorted to as a substitute for a replevin writ.

A splendid test of the meaning of "scope of employment," is whether the agent is endeavoring to promote or protect the master's business: 31 Cyc. 1585; and the question as to whether the agent as custodian and caretaker and general manager of the business of the railway com-

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pany at a station has the implied power to institute proceedings is at least a question of fact which should be left to the jury. We must not be understood as holding that this question may not sometimes be decided against the master as a matter of law. We simply direct that in the instant case and upon remand this issue be submitted to the jury, provided, of course, there be developed upon the trial evidence substantially like that introduced here. We carefully refrain from adjudicating that Gatewood was as a matter of law clothed with this power. It is well to remark, however, that in passing upon this question, it is competent to consider the usual and ordinary way which station agents have of discharging their duties, and the particular methods pursued by them in discharging their duties with respect to the instituting of proceedings and the consulting with officials about instituting proceedings, and also what this station agent generally did when situations demanding speedy action with reference to protecting the master's property arose.

The judgment of the lower Court is reversed and the cause remanded for a new trial not inconsistent with the views expressed in the foregoing opinion. Defendants in error will pay the costs of this Court.

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FELIX T. POPE v. FAY E. HAZEN, ET AL.

Writ of certiorari denied by the Supreme Court.
(*Jackson*. April Term, 1914.)

1. CHANCERY PRACTICE. *Appointment of receiver. Bill of mortgagee or trustee.*

A bill filed by a mortgagee or trustee in a deed of trust seeking the appointment of a receiver to take charge of pending foreclosure proceedings is fatally defective if it fails to allege insufficiency of the security or impairment or waste and insolvency of the vendee in possession.

2. APPELLATE COURTS. *Superseding decree. Dismissals.*

Where, upon motion to dismiss a supersedeas issued by this court it is apparent that the pleadings are not broad enough to justify any decree, this court will reverse the decree appointing a receiver and will dismiss the bill.

FROM SHELBY COUNTY.

Appealed from the Chancery Court of Shelby County,
Part 1. FRANCIS FENTRESS, Chancellor.

WM. H. FITZHUGH for Complainants.

H. H. BONNER for Defendants.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS bill was filed alone for the purpose of having a receiver appointed to take charge of, and rent a house and lot described in the bill. It is charged that defendant,

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Hazen, and wife, on the 20th of June, 1911, made a deed of trust to the complainant on the house and lot in question, to secure a note for \$3,500. It is further charged that shortly after this trust deed was made, the Security Bank & Trust Company filed a bill in the Chancery Court of Shelby County, charging that the trust deed was fraudulent and void as against it, and enjoining the complainant from disposing of the house and lot, and the defendants, Hazen and wife, from paying any money on the alleged indebtedness. It is further charged that the \$3,500 has never been paid, and that some notes for interest that were secured in the trust deed have not been paid since the bill was filed by the Security Bank & Trust Company, but that the defendants, Hazen and wife, have failed and refused to pay any of said interest notes, and have also refused and failed to pay the taxes due and owing on the property, and the premiums charged for insurance of the house on the lot. The bill charges that the trust deed provided in the event Hazen failed to pay the taxes and insurance, that complainant, Pope, might pay them and hold the property as security for such payment. Chancellor Fentress, after the bill was filed, fixed a day for hearing the application for the appointment of a receiver, and required notice to be given to the defendants, of the time and place when such application would be acted upon. Such notice was given defendants, who thereafter filed their answer.

It was stated in the bill that the property was getting out of repair and becoming dilapidated, and this charge was denied in the answer. It was admitted in the answer that the taxes had not been paid, but the reason assigned for their non-payment was that defendants had been advised not to pay them until the suit of the Security Bank & Trust Company had been finally settled. It was further

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stated in the answer that the defendants were ready and able to pay the taxes and insurance on the property when that suit was finally ended, and would do so.

The only prayer in the bill in addition to the prayer for the appointment of a receiver, to take charge of the house and lot upon which complainant had the deed of trust and to rent it out and collect the rents and profits, was a prayer that, at the hearing and after the final disposition of the cause of the Security Bank & Trust Company against defendants, said rents and profits so collected by the receiver be applied to the satisfaction of the debts secured by the trust deed, and a prayer for general relief. At the time designated by the Chancellor, he appointed the Clerk and Master, Lamar Haskill, receiver of the house and lot described in the bill, and ordered him to take charge of the property, rent it out and hold the rents subject to further orders, and if possession of the property was refused, that a writ of possession issue to the sheriff to put the receiver in possession of it. This order was made alone upon the bill and answer, and without any affidavits or any evidence to support the charges in the bill. There is no charge in the bill that the property is insufficient in value to pay the debt the trust deed secured; in fact, there is nothing said in the bill about its value. For all that appears therein, it may be worth ten times the amount of complainant's debt. There is no charge that the maker of the note, the defendant, Fay E. Hazen, is insolvent, or has no property out of which to collect any balance the house and lot fails to pay, and for all that appears from the bill as to Mr. Hazen's financial condition, he may be worth a million of dollars, or he may not be worth a cent.

After making the order appointing the receiver, the defendants prayed an appeal to this Court from such an

order, but the appeal was refused by the Chancellor. After such refusal defendants prosecuted a petition, together with a copy of the record in the case, to this Court while in session at Knoxville in 1912, for a writ of error and supersedeas, to bring the cause to this Court to review the action of the Chancellor in appointing the receiver, and for supersedeas to stay the execution of the order. This Court granted the writ of error and also the supersedeas, while in session at Knoxville at its May term, 1912, thereby staying the execution of the order appointing the receiver and removing the cause into this Court for a review of the Chancellor's action in the premises. A motion has been made in this Court to vacate the order granting the supersedeas, and the cause is now before us upon this motion, and also upon the assignment of errors to the action of the Chancellor in appointing a receiver of the property involved in this litigation, which errors are assigned by the defendants, and the jurisdiction of the Chancellor to sustain the bill and appoint a receiver, as well as grant the relief sought upon the charges in the bill, is challenged or denied.

A bill filed alone for the purpose of having a receiver appointed and which seeks no other relief, is a novel procedure to this member of the Court. A receiver is usually and generally asked for to take charge of, and to care for and protect property involved in a pending litigation. Or in other words, where property is involved in a litigation, and a party in possession of it is committing wastes, or allowing it to get in bad repair, or permitting it to deteriorate in value, or exposing it to danger of fire, then a receiver is appointed to take charge of it and preserve it for the benefit of those the Courts finds is entitled to it at the hearing of the case. But we have never known a case where a bill was simply filed,

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and the only special prayer for relief therein, was the appointment of a receiver.

In *Smith on Receivers*, p. 3, section 2, the learned author says: "The law of receiverships is peculiar in its nature in that it belongs to that class of remedies which are wholly ancillary or provisional, and the appointment of a receiver does not effect, either directly or indirectly, the nature of any primary right, but is simply a means by which primary rights may be more efficiently preserved, protected and enforced in judicial proceedings." This author says the functions of a receiver "is to hold, manage, control and deal with property which is the subject-matter of, or involved in the litigation, in case there is no person entitled who is competent to thus hold it; or where two or more litigants are equally entitled; but it is not just and proper under existing circumstances, that either of them should retain it under his control; or where a person is legally entitled to the possession, but there is danger of his misapplying or misusing it; or, under some peculiar circumstances in suits to foreclose a mortgage." The conveyance mentioned in this bill is not a mortgage, but what is known in the law of Tennessee as a deed of trust. It appears the maker of the trust deed has three years from the date of the trust deed, in which to pay the debt, and this three years will expire the 20th of June, 1914. There is nothing in this trust deed which gives the trustee the right to the possession of the property at any time before default in the payment of the debt secured in it. It is doubtful if any one has a right to the possession of it until the property is sold under the trust deed, and a deed is made to the purchaser, after which time such purchaser would be entitled to the possession. The trust deed provides that after it is thus sold, if the makers remain in possession of the property, they are then to pay

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rents for it at the rate of \$60 per month. We are of the opinion that the makers of the trust deed are not liable for rents of this property until after it is sold and a deed made to the purchaser, and that until then, they are entitled to retain possession of it without the payment of rents.

It is said in Smith on Receivers, p. 6, *et sequi*, that independent of statutory provisions, a court of equity will appoint a receiver in four classes of cases. First, where the party entitled to the custody is for any reason incompetent to hold it, such as infants, lunatics, and where the estate of decedents is involved in litigation; second, where the parties entitled to the custody of the property are competent but are otherwise disqualified; where it is involved in the dissolution of a partnership, or in the proceedings between tenants in common, or between claimants to land under legal title where gross fraud, great danger or violence is alleged; third, where the parties in custody are violating fiduciary duties and trust relationship, and among the instances given under this head, are mortgagors in possession where the security is inadequate and the mortgagor is insolvent or is committing wastes. The last class of cases where a receiver is appointed, is where the ordinary processes of law are insufficient, such as grantor's suits, or suits to reach the separate estates of married women, or where suits are instituted to wind up corporations or other associations because they forfeited their charter, or became insolvent, or otherwise acting *ultra vires*.

In treating of when a court of equity will appoint a receiver at the instance of a mortgagee, Mr. Smith says it will be done where the mortgage provides for a receiver upon default of the payment of the principle and interest; and where the mortgage security has become inade-

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quate by reason of a depreciation in the value of the property and insolvency of the mortgagor or other person liable for the mortgage indebtedness; or where there is a special grant or pledge of the rents and profits to secure the mortgage indebtedness; or where the trustee has, by the special terms of the mortgage, the power upon default in the payment of the debt, to take possession. It is stated by Mr. Smith, p. 277, "the necessity for the appointment, the special grounds upon which the relation is asked, must be clearly alleged and shown. If the mortgagor is in possession and committing wastes, that is a ground for the interposition of a court of equity." A receiver will not be appointed, "whereby the terms of the mortgage, no right to a receiver is given; nor will one be appointed where the allegations of the bill are denied, or where the amount due is in dispute." On p. 284, Mr. Smith says, "where the insufficiency of the property covered by the mortgage is shown, but the proof fails to show that the mortgagor or other person liable for the mortgage debt is insolvent," a receiver will not be appointed. On p. 287, this author says, "that the inadequacy of security which warrants the appointment of a receiver consists of two separate elements, each of which is necessary to be established by adequate proof, (1) the insufficiency in the value of the mortgaged premises to pay the debt, interest and costs, (2) the insolvency of the mortgagor, his grantee or other person liable for the payment of the mortgage debt, or at least as has been held in some cases, such a degree of irresponsibility finally as renders the collection of a deficiency judgment against him impossible." On p. 294, he says, "the inadequacy of security contemplated by the rule above has reference solely to the plaintiff's indebtedness and does not include other lien indebtedness against the property. The proof must be clear and satisfactory in

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order to warrant the Court in granting the relief under the rule under discussion." Mr. Smith further says, the failure to establish the inadequacy of the security, or the insolvency of the debtor, or the person owing the debt, is fatal to an application for the appointment of a receiver.

Applying these rules to the case, conceding that a deed of trust stands upon the same footing that a mortgage does when application is made for the appointment of a receiver, it appears in the first place that there is no charge in the bill that the property covered by the trust deed will not pay, or is insufficient to pay complainant's debt; nor is there any charge in the bill that the person owing the debt is insolvent, or is not amply able to meet and discharge it if the property fails to bring a sufficient amount to liquidate it. This author says that these charges must be made in the bill, where the mortgagor applies for the appointment of a receiver to take charge of the mortgaged property. There is not only no such charge in the bill, but there is no proof of any character whatever that the property is not amply sufficient to pay the debt secured by it. Nor is there any proof of any kind that the defendants, or the person owing the debt secured by the trust deed, are insolvent or not able to pay what remains after the property is sold and the proceeds applied, if there is any balance then due. If the trust deed was a mortgage, and not such conveyance as it is, under the rules laid down by Mr. Smith, the complainant would not have a right to have a receiver appointed. The trust deed does not provide for such appointment on default in payment of the debt, or the interest thereon, nor does it provide for impounding the rents of the place in any contingency. On these matters there is no special stipulation, and the only implied agreement is, that the makers

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of the trust deed may remain in possession without the payment of rents until the property is sold and a deed is made to the purchaser.

The rule stated by Mr. Smith in his work on Receivers may be found in Pumroy's Equity Jurisprudence, vol. 5, secs. 93 and 96, and in the latter section that learned author says, "a receiver in mortgage cases will never be appointed unless it is clearly shown that the security is inadequate, or that the rents and profits have been expressly pledged for the debt, or that there is eminent danger of waste, removal or destruction of the property. There must be some strong special reason for it. Receivers should not be appointed simply because an occasion for their appointment is anticipated, or may in the future arise. The occasion must exist when the appointment is made. The insufficiency of the security, on which the appointment is grounded, must be an insufficiency existing at the time when the application is made or acted on, not merely one that may arise at some future date."

Mr. Alderson, in his work on Receivers, states the rule as it is laid down by Smith and Pumroy.

The mere default in payment of the debt constitutes no grounds for the appointment of a receiver unless there is a stipulation to that effect in the mortgage: 43 Miss., 523. It would be oppressive and an abuse of discretion to appoint a receiver where it appears that the mortgage security was ample to pay the debt in full: 65 Minn., 64. To justify the appointment of a receiver, the Supreme Court of New York holds there must be some evidence of the insufficiency of the property to satisfy the mortgage debt: 40 N. Y., 948. If the debtor is insolvent, a receiver will not be appointed because at some future time the property may become insufficient to pay the mortgage debt: 58 Neb., 663. Where it did not appear that the

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mortgagor was insolvent, or that there was any waste contemplated, or depreciation in the property, it was held by the Supreme Court of Missouri that grounds for the appointment of a receiver were totally lacking: 157 Mo., 565. Mr. Chancellor Cooper said: "Equity will not, pending a suit for a sale of land for division among co-tenants interfere, by the appointment of a receiver, with the lawful possession of one of the tenants, it not appearing that he disputes the title or interferes with the possession of his co-tenant, especially if there is no sufficient averment of insolvency.

In *Morford v. Hamner*, 3 Bax., 391, the Supreme Court of this State refused to appoint a receiver in a suit filed by the vendor to enforce his lien for unpaid purchase-money, and said, "it is no part of the contract of sale, either express or implied, that the vendor shall appropriate anything but the land itself by sale for satisfaction of his purchase-money." It would seem that in a case where a deed of trust is made to secure the payment of a particular debt, and there is no contract by the maker of the trust deed that the trustee or holder of the deed may appropriate the rents and profits of the land, that it would stand upon the same basis as a bill to enforce the vendor's lien. The contract is limited to a sale of the property and the application of the proceeds of sale to the payment of the debt, when the debtor is in default. If he desires to have the rents appropriated, the right to do so should have been embodied in the trust deed, and failing to have it so stipulated therein, we see no reason why he should stand upon any higher ground than the vendor of land stands in reference to appropriating the rents of the land while in the possession of his vendee.

In *Cohn v. Paute*, 12 Heisk., 507, it appears that the bill was filed in that case by a creditor of the maker of

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the trust deed, to have it foreclosed, and to reach the equitable interest of the maker after the satisfaction of the prior lien and incumbrances, and to that end a receiver was prayed for *pendente lite* to take the property out of the possession of the maker of the trust deed and appropriate its rents and profits to the payment of taxes accrued and accruing after the making of the trust deed. A receiver was appointed for that purpose, and an application was made to the Supreme Court to supersede the order of the Chancellor appointing him. The Supreme Court said that, from the affidavits and counter-affidavits filed in the cause, as to the value of the property, it was at least doubtful whether the corpus of the property was sufficient to pay the debt, and for that reason it declined to interfere with the discretion of the Chancellor in appointing the receiver. In that case it appeared that it was doubtful if the property was of sufficient value to pay the complainant's debt, while in this case there is neither allegation or proof upon this question. In that case a bill had been filed by a judgment creditor, with an execution returned *nulla bona*, seeking to foreclose a trust deed and to reach the surplus, in which bill a receiver *pendente lite* was asked. No such bill as that was filed in this case, nor was such relief sought.

Counsel for complainant cites the case of *Bidwell v. Paul*, 5 Baxter, 692. It appears from the opinion delivered by Mr. Justice Freeman, that a bill was filed to foreclose the trust deed and have the property sold for that purpose, and pending the suit, that a receiver be appointed, because it was charged that possession of the property had been obtained fraudulently. The lower Court failed to appoint the receiver, and the application was renewed in the Supreme Court. The Chancellor decreed a sale of the property to pay the debt secured by the

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trust deed, when its maker appealed to the Supreme Court on the pauper oath. The opinion recites that it is alleged that the security is scarcely sufficient to pay the debt, and on this showing the Supreme Court appointed the receiver, basing its action upon the insolvency of the debtor, and the insufficiency of the security. That case does not by any means sustain the action of the Chancellor in appointing a receiver in this case, and we have reached the conclusion that his order appointing a receiver was authorized neither by the allegations in the bill, nor by any proof of any kind heard by him in any way, at the time he acted on the motion for the appointment, and that his order appointing the receiver was wholly unauthorized and not warranted by the allegations or the proof in the case. As we have said, the only additional prayer is that the rents collected by the receiver be held in Court and applied as a payment on complainant's debt against the defendant. The deed of trust has no provision in it authorizing such a decree or order, and on final hearing the Court would have no jurisdiction to direct the payment of the rents and profits on the debt complainant has against the defendant. But as there will be no receiver appointed in this case, there will be no rents and profits to dispose of at the hearing of the cause. Such being true, there is no reason why this cause should be kept longer in Court. On the facts stated in the bill, complainant is not entitled to any relief under the prayer for general relief, and it results that the bill must be dismissed and the costs of this Court and of the Court below adjudged against the complainant and the sureties on his cost bond. The motion to vacate the order granting the supersedeas is overruled, and the order of the Chancellor appointing the receiver is reversed, the cause dismissed and a decree entered here against complainant and sureties for all the costs of the cause including the cost of the appeal.

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WESTERN UNION TELEGRAPH COMPANY v. A. B. WRIGHT
AND WIFE.

TELEGRAPH COMPANIES. *Right of action of sendee for disappointment and inconvenience.*

The sendee of a telegram in this State may recover substantial damages for inconvenience, annoyance and disappointment occasioned by the negligence of a telegraph company in failing to deliver promptly a telegram, the receipt of which would have saved the sendee from the beforementioned vexation, inconvenience, etc.

FROM HOUSTON COUNTY.

Appeal in error from the Circuit Court of Houston County. W. L. COOK, Judge.

L. R. CAMPBELL for Plaintiff in Error.

W. W. PATTERSON for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THE principal question involved in this case is whether the sendee of a message requesting her to abandon a journey can recover substantial damages for its non-delivery. Verdict and judgment were for \$250.00. The Telegraph Company has appealed and assigned errors.

The facts are substantially as follows: Dr. Wright, the sender of the message, resides at Erin. His father lives at Dickson. His wife was, on August 1, 1912, on a visit to her father-in-law at Dickson. She had two chil-

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dren with her. It was understood between Dr. Wright and wife that she would take passage upon a train which leaves Dickson at 8.35 A.M., and ride to a station called Hematite on the railroad leading to Clarksville, and that he would meet her there and go with her to Clarksville. At an early hour on the morning of August 2d he went to the telegraph station at Erin and informed the agent of his desire to send a message to Mrs. Wright, such as would cause her to abandon her trip, he having concluded not to go to Clarksville. He thereupon wrote out and delivered to the agent for transmission the following message: "Mrs. A. B. Wright, care Dr. L. D. Wright, Dickson, Tenn.: Don't leave. Will see you at 3.47 this P.M. (Signed) A. B. W."

This was at 4.10 A.M. It was transmitted as a night message, which, by the rules of the company, was not to be delivered earlier than 7.30 A.M. Dr. Wright informed the agent that the message must be delivered to Mrs. Wright before she embarked on the 8.35 train. We take it that the Erin agent expressly or impliedly assured Dr. Wright that this would be done. As a precaution Dr. Wright had his message repeated at extra cost. As we understand it, the message was repeated at Dickson back to the agent at Erin. This certainly amounted to an assurance of delivery as stated by Judge Lurton in *Marr v. Telegraph Company*, 1 Pickle, 529. Dr. Wright's father, also a physician, resided and had an office within two hundred and fifty yards of the receiving station at Dickson. This message was not in fact delivered until sometime after 9 o'clock of the day of its transmission. Mrs. Wright in the meantime had gone to the trouble of preparing herself and children for the journey to Hematite and had taken passage on the 8.35 train. At the time she started and during the journey she expected her husband to meet her

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at Hematite and go on with her to Clarksville. As a matter of course she was disappointed. She spent the day at Hematite and returned to Dickson late in the evening. Her husband had in the meantime gone around by Nashville and to Dickson for the purpose of meeting her at the hour named in his telegram. It clearly appears that Dr. Wright fully informed the Erin agent of the importance of prompt delivery.

It is earnestly insisted by learned counsel that nominal damages only, if anything, should be recovered, and that the trial Judge committed error in not so instructing the jury. The predicate of this ingenious argument is that the Courts of our State have fixed the limits of recovery for mental anguish and that this case does not fall within any classifications; and that this amounted to no more than vexation or annoyance to Mrs. Wright, for which no recovery can be had. We are persuaded that the contrary is the sound view to take. Our Courts for a time undertook to fix the classification of the rights of action for non-delivery of telegrams. Particularly do we recall the case of *Telegraph Co. v. McCaul*, 7 Cates, 99, in which Mr. Justice Shields intimated that the Court would not thereafter extend the doctrine of mental anguish beyond the rules theretofore laid down. It soon became evident, however, that the right of recovery could not be arbitrarily fixed; and it may be parenthetically said that it would be unwise in the Court thus to undertake to circumscribe the situations in which recoveries might be had, in view of the everchanging and varying uses of these means of communication. In the case of *Telegraph Co. v. Kirkpatrick*, 2 Tenn. C. C. A., 41, Mr. Justice Hall discriminately and clearly analyzed the McCaul case and reached the conclusion that the utterances therein with respect to confining this class of cases to nar-

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row limits was dictum. This case was affirmed by the Supreme Court.

It is wholly unnecessary to review the adjudications of our Supreme Court in their entirety. We are convinced that the case of Wadsworth, reported in 2 Pickle, 695, is and should remain the leading authority upon this question; and we think it well that occasional reference be made to the concurring opinion of Judge Turney in that case; nor should the clear and convincing logic of Judge Caldwell be overlooked or discounted. It was made prominent in that decision that whenever the telegram conveys information which is valuable to the sendee and to which he is entitled, a right of recovery for substantial damages should be recognized. There is clearly deducible from the propositions of the Wadsworth case the rule that where the sendee suffers disappointment and is subjected to vexation, trouble or annoyance by reason of the failure of the company to deliver a telegram desired, a substantial recovery should be had. See also *Telegraph Co. v. Robinson*, 13 Pickle, 638.

Recurring to the facts of this case, we are unable to discover any reason why the Telegraph Company should not suffer some penalty for failing to communicate to Mrs. Wright that information which would have saved her the trouble and expense and wear of a journey of some thirty or forty miles. It certainly should not be excused for subjecting her to disappointment and some apprehension naturally expected from reaching Hematite and not finding her husband there. We have no hesitancy in saying that for this wrong more than nominal damages should be awarded. We have examined the authorities pressed by learned counsel, but do not think they are persuasive. We find upon the other hand at least two cases which lend material support to the conclusion we have reached: *Green*

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v. Telegraph Co., 7 L. R. A., 985; *Cable Co. v. Terrell*, 14 L. R. A. N. S., 927. The rule deducible from these cases is that a telegraph company can be held liable for substantial damages for failing to deliver a message which would have saved the sendee from annoyance, vexation, fear or humiliation.

We overrule the assignments of error predicated on the failure of the Court to give peremptory instructions. There is one assignment of error, however, to which we must pay particular attention. It is said that the verdict is so excessive as to indicate passion, prejudice or caprice, and in connection with this assignment is another one to the effect that the jury in returning their verdict disregarded the instructions of the Court. We pause to remark that this is frequently a very apt way of testing the justice or propriety of the verdict. His Honor told the jury that they must confine their verdict to substantial damages and that they must not award any recovery for punitive damages, and yet, they clearly went beyond the limits of compensatory damages. It is a hard matter to determine in dollars the extent to which a party has mentally suffered, and this of course renders dangerous the power sometimes exerted by Courts to set aside verdicts. At the same time, however, they must not shrink from so doing when convinced that jurors have arbitrarily and capriciously affixed an unjustifiable penalty or recovery.

We have carefully looked into the circumstances and happenings which Mrs. Wright insists were the causes of her sufferings, and have reached the conclusion that the jury exaggerated them very much. She admits that she would have had a reasonably good day with her relative, with whom she stopped and spent the day at Hematite, but for her sickness. Of her illness the company had no knowledge, and this should not enter into the computation

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of her damages. Without elaboration, we shall state that we have concluded that this verdict is excessive to the extent of \$150.00. If she will remit in this Court \$150.00, judgment to the extent of \$100.00 and costs will be affirmed. Otherwise, it will be remanded for a new trial, defendants in error paying the costs of this Court.

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Affirmed by the Supreme Court.

(*Knoxville*. September Term, 1913.)

PUBLIC OFFICE. *Records. Order to turn over to successor.*

Sections 1126 and 1127, Shannon's Code, requiring an incumbent of a public office to turn over the books and papers pertaining thereto to his successor cannot be invoked by the newly elected official during the pendency of a regularly instituted contest of the election waged by the incumbent of the office.

FROM CLAIBORNE COUNTY.

Petition for writ of error and supersedeas to the law and Circuit Court of Claiborne County. XEN Z. HICKS, Judge.

JOHN P. DAVIS and L. D. SMITH for Parkey.

PAUL E. DEVINE for Sharp.

MR. JUSTICE MOORE delivered the opinion of the Court.

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THIS is a petition filed in this Court praying for writs of certiorari and supersedeas to the Judge of the Criminal and Law Courts of the Second Judicial District, the Hon. Xen Hicks, to the end that his order, requiring petitioner to turn over to A. K. Sharp all the books, papers and other property belonging to, or connected with, the office of trustee of Claiborne County, be reviewed by this Court and declared null and void.

The petition was presented to Judge Hughes, a member of this Court, and a fiat granted by him to the Clerk of this Court, directing the issuance of the writ as prayed for in the petition. Judge Hughes also ordered the Clerk of this Court to issue writs of certiorari and supersedeas to the Hon. X. Z. Hicks, Judge, and to the Clerk of the Circuit Court of Claiborne County, to the end that they make out, or cause to be made out, a duly certified and complete copy of the record in the case of *A. K. Sharp v. W. C. Parkey*, had before Judge Hicks, wherein possession of the books, papers and property belonging to the office of trustee of Claiborne County was ordered to be turned over to said Sharp by Judge Hicks. The Clerk of this Court issued the writs of certiorari and supersedeas as directed by the fiat of Judge Hughes, on the 23d day of April, 1913, which was executed on May the 1st, thereafter.

This proceeding grew out of the election of a trustee for Claiborne County, at the regular August election of 1912. For several years before that date the petitioner, Parkey, had been elected to the office of trustee of that county and had served several terms as such officer. He and Mr. Sharp were rival candidates for the office of trustee, at the August election, 1912, and it is stated in the petition and exhibits thereto that the returns of the officers holding said election, at the various voting places in

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said county, show that Mr. Parkey received a majority of the legal votes cast in said election, and was, therefore, elected to the office of trustee of Claiborne County, by the qualified voters thereof. On Saturday, following this election, there arose a bitter contest between Parkey and Sharp as to which should be inducted into the office of trustee of the county. We will not undertake to specify in detail the different lawsuits that grew out of this election, and which were instituted with a view of determining which was the successful candidate for that office. Bills, amended bills and supplemental bills were filed in the Chancery Court of that county by petitioner, Parkey, against two of the election commissioners of the county, the object and purpose of which was to show that he was elected at the August election.

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Petitioner, Parkey, states in his petition that he made bond as county trustee, that his bond was approved and accepted by the County Judge, that he was sworn into office as such trustee and continued thereafter to perform the functions and duties as trustee of Claiborne County. He further states, in his petition, that he has the books, papers and other property of the office in his possession all the time, and that he has in the regular and lawful way, collected the taxes from 90 per cent of the taxpayers of the county who have paid their taxes for the year 1912; that the County Judge has recognized him as such county trustee by making settlements with him as such, and, also, by paying his taxes to him as such trustee; that the Comptroller of the State has recognized him as such county trustee, and that he has collected and paid to him that part of the State revenue due and owing by 90 per cent of the taxpayers who have paid their taxes.

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It appears from this that both Parkey and Sharp have been acting as trustee of Claiborne County ever since the first Monday in October, 1912, both having made bond and taken the oath as such, and both collecting taxes. In the meantime, while a bitter contest is being waged in the Chancery and Circuit Courts as to who is legally entitled to that office in Claiborne County. The person rightfully entitled to it has never been settled by any Court, and such was the condition of affairs in reference to this office on March the 19th, of this year, at which date both Parkey and Sharp were waging a heated and embittered controversy in the Courts, over which was entitled to office and its emoluments. On that date Judge Hicks, who had recently been appointed by the Governor of the State to the office of Law and Criminal Judge of the Second Judicial Circuit, which office had also shortly before then been created, issued an order to petitioner, Parkey, at the instance of his rival, Sharp, requiring Parker to appear before him, Judge Hicks, in the Circuit Court room at Tazewell, Tennessee, on the 26th of March, 1913, to show cause why he should not be compelled to deliver to Sharp the books, papers and other property belonging to the office of county trustee of Claiborne County.

It is insisted by learned counsel that jurisdiction to hear such complaint is vested, by section 1127 of Shannon's Code, in a Circuit Judge, or in the chairman of the County Court, and that, inasmuch as Judge Hicks is not a Circuit Judge, he has no jurisdiction of the matters in controversy. Counsel argue that the Circuit Judge is made by this section a special tribunal to hear and determine complaints like the one now before us; and that, as Judge Hicks is not a Circuit Judge, he had no jurisdiction to pass upon the questions presented to him.

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We do not pass upon this question, however, as we think it unnecessary in order to adjudge the right of the parties, for we think it clear and beyond controversy that sections 1126 and 1127 contemplate and provide for a case where there is in fact a vacancy in an office, and that there is, as yet, no vacancy in the office of trustee of Claiborne County is equally as free from doubt. These sections authorize such proceedings only when the applicant's right or claim has been settled beyond controversy, and finally settled; and when that is the case, and the person in charge of the books, papers and other property belonging to the office, refuses to deliver the same to the person entitled thereto, then he may, and not until then may he invoke the provision of sections 1126 and 1127 of Shannon's Code. It cannot be truthfully argued, or insisted that there ever has as yet been a vacancy in the office of trustee of Claiborne County, such as to entitle Mr. Sharp to resort to these proceedings. From Saturday after the August election, in 1912, to this good hour, a bitter contest has been waged between Parkey and Sharp as to who is entitled to that office; Parkey all the time remaining in possession of it, holding the books, papers and its other property, and discharging the duties of the office. Until that contest between them is settled and the Courts have decided who is entitled to the office, neither of them could invoke the provisions of these sections of the Code. For until that is done, there is no vacancy such as is contemplated therein, and which authorizes the institution of such proceedings.

This was the view taken of a like controversy by the Supreme Court of Tennessee in the case of *John P. Davis v. Frank Evans*, decided at the September term at Knoxville, in 1909, in an opinion delivered by Judge Bell.

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Section 1126, of Shannon's Code, provides: "When any office is vacated, all books, papers, etc., belonging or appertaining to such office, shall be on demand delivered over to the qualified successor"; and it is clear in this case that the office of trustee of Claiborne County has never been vacated and probably will not be vacated until the legal proceedings, heretofore mentioned, are all ended and the Courts have declared who is entitled to the office. Where there is no vacancy in the office then there is no authority for the institution of such proceedings as we now have before us, and there being no authority it follows that the orders and decrees of Judge Hicks are a nullity, and a decree will be entered here to that effect, and a judgment rendered against Defendant Sharp for all the costs of this cause.

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CLAUDE WILLIS V. MANUFACTURING COMPANY.

1. LANDLORD AND TENANT. *Sublessee. Lien on crops for rent.*

A tenant who sublets lands is entitled to a lien upon the crops of the sub-tenant; and he may, after satisfying the landowner, pursue all the remedies given by statute to landowners for the collection of rents.

2. JUSTICES OF THE PEACE. *Appeals. Failure to file papers.*

The failure of a justice of the peace to file the papers at the term of court to which an appeal from his judgment has been taken will not affect the jurisdiction of the Circuit Court if promptly at the next term the appellant takes steps to have the papers brought into court.

3. SAME. *Certiorari. Diminution.*

Petition for certiorari is an appropriate remedy where a justice has failed to file the record of a case appealed to the Circuit Court.

4. SAME. *Notice of filing petition. Dismissal.*

It is error for the Circuit Judge to dismiss a petition used for the above purpose for lack of notice to the defendant of the filing of the petition, nor can the original suit be dismissed because of failure to give this notice, if the party filing the petition is endeavoring to have notice given.

5. APPEAL FROM JUSTICE OF THE PEACE. *Presumption from recital of prayer for appeal in oath for poor persons.*

A recital in the pauper oath made in lieu of bond for costs is *prima facie* evidence that an appeal from the justice's judgment was prayed for and granted.

FROM DYER COUNTY.

Appeal in error from the Circuit Court of Dyer County.
JOSEPH E. JONES, Judge.

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WILLIAMS & WARD for Plaintiff in Error.

DRAPER & RICE for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

ON the 6th day of February, 1913, plaintiff, Willis, sued the defendant before a justice of the peace upon an indebtedness claimed to be due upon an account or for damages for the conversion of six thousand pounds of seed cotton upon which a landlord's lien existed. It was stated in the warrant that the suit was brought in the name of Willis in his own right and for the benefit of one George E. Scott. This suit was tried by a Dyer County justice on the 10th day of February, 1913. The justice dismissed the cause insofar as Scott was concerned, and gave judgment against Willis, and in favor of the Manufacturing Company.

The Circuit Court of Dyer County was in session at the time the appeal was prayed, assuming for the time being and for the purposes of this case that an appeal was taken on the 12th day of February, 1913.

For some reason not material now to be determined, the justice of the peace did not return the papers to the Circuit Court during the February term, and no effort was made by either party to have the papers produced and the cause docketed and disposed of. The papers not having been filed on the 4th day of June, 1913, Willis filed a petition for certorari. This was presented to Circuit Judge Jones on the 9th of June following. In this petition Willis recited in substance that the cause had been tried on the 10th of February, 1913, and had been decided adversely to him, and that on the 12th he had prayed and perfected his appeal and had made and filed his pauper oath in lieu of an appeal bond, and that the

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justice had neglected, failed or refused to file the papers as was his duty. Petitioner averred that he lived some distance from Dyersburg, and that at the time of the trial and at the time the February, 1913, term of the Circuit Court of Dyer County convened or was to convene, there was prevalent in Dyersburg an epidemic of cerebro-spinal meningitis, and that this prevented him from attending this Court, and that it in fact caused a suspension and an adjournment.

The prayer of this petition was in substance that the justice be required to file the papers and that the case be brought into Court for a retrial upon the merits. Petitioner averred that he was very much aggrieved by the judgment of the justice, for the reason that the petitioner was holder of a lien note or claim upon the cotton, which had been wrongfully purchased by the defendant. The petitioner further claimed that a tenant of his had wrongfully sold the cotton to the defendant, and that the defendant as purchaser thereof during the existence of the landlord's lien was liable to the petitioner therefor. It appeared from the other averments that Scott was the owner of the land on which the crop was raised and that Scott had leased the land to Willis and that Willis had subrented to one Morgan, who had in turn sold to the defendant. It was stated in the petition that the landowner, Scott, had been fully paid, and had no lien upon the cotton. Petitioner averred that it was through no fault of his own that the papers were not filed by the justice. The prayer of the petition was that certiorari be issued to the justice, requiring him to file the papers, and that the cause be tried in the Circuit Court.

This petition was filed and fiat granted on the 9th day of June, 1913. On this date a certiorari to the justice who tried the cause was issued and was served upon

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him on the 10th day of June. On the 9th or 10th of June, 1913, the Clerk issued notice to the defendant, reciting the fact that certiorari to remove the papers in the former cause to the Circuit Court for retrial had been granted, and that it was intended by said process to so notify said defendant.

For some unaccountable reason the sheriff made the following return upon this process: "Executed this 10th day of June, 1913, by notifying the witness or bookkeeper, Mr. C. H. Cloud, to bring the within named book into Court and demanding him to appear as their agent, this June 11, 1913." This service or return was, of course, an absurdity. It seems that pursuant to the notice given the justice of the peace immediately filed the papers. These papers consisted of the original warrant and the judgment thereon, and a pauper's oath.

On the 14th of June, 1913, the defendant appeared in Court and filed its plea in abatement to the petition. In this plea the return of the sheriff above set out is quoted, and it is averred that the defendant was a domestic corporation whose president and secretary both resided in Dyer County, and it had no employe by the name of C. H. Cloud, and it averred that the alleged service of notice was void. On the 30th of June following and during the same term of the Court, the petitioner filed what it denominates a replication to plea in abatement. This replication is in substance: 1. "That plaintiff takes issue on defendant's plea." 2. "The plaintiff says that since the filing of said plea a full, complete and faultless notice has been served on the defendant and filed in this cause." 3. "The plaintiff further pleading says that defendant has had complete and actual notice of said certiorari since the day of said notice and was then and immediately thereafter fully and completely notified." 4.

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"Plaintiff further pleading says that notice was not necessary or required in this case."

Upon filing this replication, the attorneys of defendant moved the Court to strike out the second, third and fourth grounds specified therein and to require the plaintiff to stand upon his first ground of replication. The Circuit Judge sustained this motion, thus leaving the record in the plight of having the plaintiff go to trial with the defendant upon the one issue as to whether the service on Cloud was service upon the company. The effect of this was, of course, to ignore the averments that the company had been duly notified by regular service of process and also the insistence that the proceedings were valid and the petition good and effectual, to bring up the record without formal notice to the defendant.

We judge from the record that plaintiff virtually conceded that the first notice was not served. The necessary result therefore was that the Circuit Judge directed a dismissal or an abatement of the petition for certiorari. Plaintiff excepted and prayed and perfected his appeal and has assigned errors.

We are of opinion that the learned Circuit Judge was in error. We shall in disposing of the questions raised divide our opinion into sections and meet all of the issues raised by both sides.

1. It is urged by learned counsel for defendant in error that plaintiff in error should be repelled because of the failure of the justice's paper to disclose the fact that an appeal from his judgment had been prayed and granted. There is no recital of granting an appeal upon the warrant. We are of the opinion, however, that the taking of the pauper's oath and tendering of the same to the justice and his acceptance thereof is *prima facie* evidence of the prayer for and granting of the appeal. The presump-

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tion that the appeal was prayed and granted must obtain when this is done just as in those cases where the execution of an appeal bond would have this effect: Shannon's Code, 5990. It is well that we remark that the petitioner averred that the appeal was prayed and granted and that the pauper's oath had been filed. These averments must stand as true upon plea in abatement or upon motion to dismiss unless contradicted by the record.

2. It is further insisted that petitioner is simply in the attitude of a tenant who seeks to enforce a landlord's lien against a purchaser from a subtenant, and that a tenant in such case has no lien. The case of *Sam H. Williams v. Phoenix Cotton Oil Company*, Dyer County Law, 1912 term of this Court, has been referred to as sustaining this view. The decision in that case, prepared by Presiding Justice Wilson, has been carefully examined by us. We are unable to concur with counsel in their construction of the holding of this Court upon the question. That was a case in which the subtenant of a subtenant had sold a part of a crop, and the effort of Hon. Sam H. Williams, the plaintiff, was to assert as assignee of this subtenant a landlord's lien against the purchaser from this remote subtenant. It will readily be seen that the relations were more complicated and far removed than those shown here. With respect to the right of a tenant as against his own lessee, Mr. Justice Wilson virtually stated that the tenant had a lien to secure the note or obligation of the subtenant, and that the assignee of his (the first tenant's) note might enforce the lien as against the purchaser from the tenant's lessee or tenant when the landlord's rights were not involved or embarrassed. This conclusion was reached after a critical examination of the opinion in *Briggs & Moore v. Piper*, 2 Pickle, 589; and we are of opinion that this should be adopted or considered

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to be the rule in all cases where a tenant has an unembarrassed claim against his lessee; and by unembarrassed claim the Court has reference to situations where tenants of landowners have fully settled with them. In such cases tenants have an undoubted right to consider themselves with respect to *their* lessees the absolute owners of the rented premises.

By proper construction of our statute, Shannon's Code, 5299, a tenant is with respect to his lessee entitled to the lien secured to landlords. This section is simply that *any* debt due for the rent of land shall be secured by a lien on the crops grown on the rented land. This statute certainly does not restrict the lien to landlords. Again, in *Hammond v. Dean*, 8 Baxter, 193, it was held that a lessee of land unless restrained by his lease might subrent, and that when he did so the relation of landlord and tenant with all the implications and rights given by the law was created as between the first tenant and *his lessee*. We find in the case of *Montague v. Mial*, 89 N. C., 137, and in *Forrest v. Durnell*, 86 Texas, 647, that the crops of a sublessee are under a double lien, one to the owner of the land, and the other to his immediate lessor; and that with respect to the first tenant and the under-tenant this lien undoubtedly exists and is enforceable after the lien of the landowner shall have been satisfied.

We are content without more to hold that the petition showed merits.

3. The next contention is that the Circuit Judge was not in error in dismissing the petition for lack of notice to the defendant in error. The petition was a proceeding purely and simply for the purpose of having a justice of the peace who had failed to file the papers in the Circuit Court discharge this duty. It was a process sought for the purpose of perfecting an appeal which had been

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taken from a justice to the Circuit Court. It was in legal effect a suggestion of diminution of the record and a request preferred to the Appellate Courts to require the inferior judicature to transmit to the higher Court the papers which were necessary to the exercise of jurisdiction upon the part of the higher Court. It is of no concern or import that the prayer was that the record be brought up and that the cause be *retried*. The averments of the petition were in substance that the Circuit Court had, by virtue of the appeal, acquired jurisdiction of the case, and could and should make an order upon the justice to file the record. We repeat that, treating the averments of the petition as true, the original cause was in legal effect in the Circuit Court. Hence, this petition was but ancillary, and irregularities with respect thereto could not affect the question of jurisdiction or the merits of the original controversy.

If this position be sound, it necessarily follows that the learned trial Judge was in error in dismissing the case or the petition for want of notice originally given. The Court was certainly in error in ignoring the second, third and fourth sections of the replication to the plea in abatement. In so doing the learned Judge adhered too closely to form and technicalities. It was a sufficient replication to the plea in abatement that the defendant had been given due and proper notice; and it was likewise a sufficient answer, assuming for the time being that the position was sound, that the petition should not be dismissed for lack of notice, for the reason that the writ was not quashable because no notice had been given.

We find upon an examination of the authorities that where a petition for certiorari which is filed for the purpose of perfecting jurisdiction or as ancillary to another suit, no formal notice as a condition precedent is required; nor

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can a petition of this kind be dismissed because of failure to give formal notice: *Brown v. Brown*, 2 Pickle, 306. The rule is that the petition in such cases is not a new suit or the institution of a new suit, but a mere application to the Court which remains on file without formal notice to the other side. It is true that the opposite party is not affected therewith until notified, but when informed that the application or petition has been made, the practice is to appear in Court and move to dismiss for lack of merits, etc.: *Mann v. Roberts*, 11 Lea, 65. This Court is not aware of the dismissal of a suit because of an application for certiorari to be issued as upon suggestion of diminution of the record was made without notice to the other side. At all events, striking such a petition from the files of a case for lack of notice when there is a solemn averment of record that notice had in fact been given is unthinkable. Hence, we are of opinion that when the trial Judge required plaintiff in error to submit the result of the litigation upon the issue as to whether the plea in abatement was true, he terminated the controversy upon an immaterial and non-essential proposition.

The practice of filing a petition for certiorari to issue to a justice requiring him to file the papers in a case appealed to the Circuit Court has long been recognized in this State, and the efficacy of such a remedy should not be denied or discounted by mere technicalities: *McGhee v. Grady*, 12 Lea, 92. This writ should have been granted by the Circuit Judge, as it was granted in this case, and it should have been treated as efficacious in bringing into the Circuit Court the papers which the justice should have filed theretofore. The Circuit Judge should have taken the view that the original cause was already in his Court, and that the petition was filed in aid of his jurisdiction, and that all the defendant could expect or demand was an

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opportunity at some stage of the case to move to dismiss the petition, but not to dismiss the cause and deny plaintiff in error the right to proceed. In law and as a matter of fact all parties were in Court when the appeal was taken. It was the duty of defendant in error to attend and defend; and we are unable to discover any substantial legal reason upon which plaintiff in error could be entirely excluded and repelled from the lower Court simply because of an error of the sheriff in serving notice of the filing of an ancillary petition.

The Circuit Judge should have treated the cause as regularly in his Court for trial on the merits. He should have treated the petition for certiorari as serving the purpose of bringing the papers into the Court and thus completing the record for trial. It was certainly the height of technicality to quash or dismiss this petition, for it had subserved its ancillary purpose, and there was no legal prejudice that could have followed from the entertaining of the proceeding. At all events, when the justice filed the papers pursuant to the command, there was nothing subject to abatement. All that the defendant could demand was an opportunity to appear and object to the operation of the petition.

It is unnecessary to pursue this matter any further. The judgment of the lower Court denying plaintiff in error the benefit of the petition for certiorari is reversed, and the cause is remanded to the lower Court with directions to proceed in the regular way to try the cause, with the reservation to the defendant in error of the right to take issue on the averments of the petition or to move to dismiss the same if it have any legal ground therefor. If the petition be resisted upon the ground that notice of its filing and contents had not been served upon defendant, this can all be cured by alias or pluries notice of its filing.

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It is well at this day and time for the Courts to recognize the fact that causes are to be tried upon their merits instead of upon pure technicalities. It is true that forms and procedure must be reasonably observed, but our statute of *jeofails* forbidding absolutely the dismissal of suits for defective process, etc., saves parties from just such missteps as defendant in error complains of in this case.

Defendant in error will pay the costs of this Court.

ILLINOIS CENTRAL RAILROAD COMPANY V. HENRY XIGAS.

Writ of certiorari denied by the Supreme Court.

(*Jackson*. April Term, 1913.)

1. EVIDENCE. *Judicial knowledge. Railways.*

The courts will judicially know that the tracks of a large railway system extend beyond the State line and that the railway company is engaged in interstate commerce.

2. MASTER AND SERVANT. *Federal Employers' Liability act. Assumption of risk.*

The Federal Employers' Liability Act does not take away the defense of assumption of risk upon the part of employees.

3. SAME. *Risk of fellow-servants.*

But a master cannot under the defense of assumption of risk successfully assert that the negligence of fellow-servants is an assumed one, although at the common law the risk of injury from a fellow-servant was and is characterized as

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one of the dangers of the employment, and although the risk is indirectly connected with a bad system, risk of which may be assumed.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County. Division No. 3. T. B. PITTMAN, Judge.

BIGGS & EVANS for Plaintiff in Error.

KING & KING for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS suit was brought by defendant in error to recover of the railway company damages for injuries claimed to have been received while working in its service as a track repairer. It was tried before the Court without the intervention of a jury. The result was the rendition of a judgment in favor of Xigas for \$250.00. To reverse this judgment this appeal is prosecuted. One assignment of error, namely, that the evidence does not support the verdict, is sufficient to raise all questions bearing upon the question of liability.

The contention of defendant in error in the Court below and here was and is, that he was entitled to a recovery under the Federal Employers' Liability Act; and it is conceded by his learned counsel that unless the proof brings the case within the provisions of this Act, there can be no recovery. It is urged on the contrary that the proof fails to show that defendant in error was injured while working on an instrumentality of interstate commerce, and that therefore the suit should be dismissed

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for the reason that the evidence is beyond dispute that he was injured either by the negligence of a fellow servant or by a danger or defect, the risk of which he had assumed.

Taking up the first of these contentions urged, that of failure to show that defendant in error was engaged or working on an interstate instrumentality, we find the record quite meager. Nevertheless, we have reached the conclusion that sufficient facts were developed from which to infer the ultimate fact that he was so engaged. All that we ascertain is that he was working on the main track of the Illinois Central Railway Company in its yards or terminals at Memphis. It is said that there was no proof that this railway company was engaged in interstate traffic at the time. It is true there is no specific proof to this effect; at the same time, however, we feel constrained to know judicially that this is an extensive railway system, and that its trackage and business penetrate a number of States of the Union. We know as a geographical, historical and commercial matter that this railroad system extends to or from the State of Illinois and through the State of Kentucky and into Tennessee, and that it is now and for a number of years has been actively engaged in the business of transporting passengers and freight through the States named. If we are aware of this fact because of its generality and notoriety, it is useless to adduce evidence thereof. We find abundant authority to sustain the proposition that the Court can take judicial notice of the location, length and territory of a great railway system: *Am. & Eng. Ency. of Law*, 2d Ed., Vol. 17, p. 944, and cases there cited; *Ry. Co. v. Walker*, 95 S. W., 743; *Patterson v. Coal Company*, 15 L. R. A. N. S., 733, and cases and authorities therein cited. Lastly, we refer to a case in our own State, that of *Hobbs v. Ry.*, 9 Heiskell, 873, which puts the matter beyond dispute. It was held in the case

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last cited that the Courts of this State were authorized to take judicial notice of the fact that the track of a well established railroad system extends from this State to another State, or from another State to this one.

So that we are bound to assume that Xigas was working on the main track of this interstate railway system at the time he was injured. It is further urged that the mere fact that he was repairing the track is not sufficient to bring him within the Act. We feel constrained by the weight of authority to take the contrary view. The Federal Courts seem to have settled the proposition that a laborer engaged in repairing the main track of an interstate railway company is engaged in working on an instrumentality of interstate commerce. It is not necessary for us to enter at length upon a discussion of this question, as it has been virtually settled: *Dougherty on Liability of Railroads*; *Zicos v. Railway*, 179 Fed., 893; *Smith v. Southern Ry.*, majority opinion of this Court at last term. It is the opinion of the writer that this is stretching the Act somewhat beynd its original purview, but we feel constrained to yield to those whose final construction must be accepted.

It is finally urged by learned counsel for plaintiff in error that Xigas was injured because of deficiencies and dangers of which he was aware and which he must be held to have assumed; and it is insisted that the Federal Act does not take away the defense of assumption of risk. We are of opinion that the Act does not deprive the master of the right to rely upon this defense. It is true that negligence of fellow servants is one of the risks assumed by an employe, but this cannot avail plaintiff in error when the very wording of the statute takes away the defense of negligence of a fellow servant.

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The evidence shows that Xigas was engaged in the laying of rails on the main track. The rail which fell upon him was being handled by two co-laborers with himself. It fell because of the negligent or reckless manner in which his co-workers handled their end. It is clear that they did not exercise due care and that because of this the rail fell upon his foot and injured it.

It is earnestly and ably argued that Xigas was injured as the result of a defective system and arrangement, the risks of which were well-known to him. It is doubtless true that a servant may be held to have assumed the risk of a bad system or a defective arrangement of the business or of the place of business, and this might include the failure of his master to furnish a sufficient number of hands. But in the case at bar we are convinced that the proximate cause of Xigas' injuries was the carelessness or recklessness of fellow servants, a risk which is explicitly excluded by the statute.

The verdict of \$250.00 is assailed as excessive. There is nothing to indicate that the Circuit Judge was actuated by passion, prejudice or caprice, and we are not warranted in disturbing judgments rendered by Judges without the intervention of a jury unless there be something in the record to indicate one or more of the above named ingredients. The judgment is affirmed with costs.

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ILLINOIS CENTRAL RAILWAY COMPANY V. REUBEN LIGHT.

Writ of certiorari denied by the Supreme Court.

(*Jackson*. April Term, 1914.)

PLEADING AND PRACTICE. *Variance. Railroads. Fencing act.*

The averment in a justice's warrant that a railroad company lawfully killed a mule colt is not sustained by proof that the animal was killed on the railroad track in a collision with a motor car owned by an individual not connected with the railway company, who was using the railway track at the time. In order to hold the company liable under the Fencing Act of 1891, it must be shown that the animal was killed by the railway company or its employes.

FROM DYER COUNTY.

Appeal in error from the Circuit Court of Dyer County.
JOSEPH E. JONES, Judge.

DRAPER & RICE and C. N. BURCH for Plaintiff in Error.

WILLIAMS & WARD for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS suit was begun before a justice of the peace for Dyer County, to recover "damages for killing one sorrel filly colt on said railroad track between Dyersburg and Tiger Tail on October 13, 1912." The suit was tried by the justice on appeal from his judgment, was heard by

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the Circuit Judge and a jury, when, at the conclusion of all the evidence, the defendants moved the Court for a directed verdict in their favor, which motion was overruled, and thereupon the Circuit Judge instructed the jury to return a verdict in favor of the plaintiff, Reuben Light, against the Railroad Company for \$50.00, the agreed value of the mule. He instructed the jury to return a verdict in favor of the defendant, Pollard, against the plaintiff, Light. The jury returned verdicts in accordance with such instructions, and thereupon a judgment was rendered against the Railroad Company in favor of the plaintiff for \$50.00 and the costs of the suit, and in favor of the defendant, Pollard, against the plaintiff for the cost incident to making him a party defendant. The railroad company appealed, and has assigned as error the action of the trial Court in refusing to sustain its motion for a directed verdict in its favor. It has also assigned as error the action of the Court in directing the jury to return a verdict against it in favor of the plaintiff for \$50.00, the value of the animal alleged to have been killed. These two assignments will be considered together.

This suit was brought against the railroad company and one W. N. Pollard, to answer plaintiff in a plea of debt due by damages for killing one sorrel filly colt on said railroad track, and the evidence shows that the animal was neither killed nor injured by the defendant Pollard, or by any one of the employes of the defendant railroad company. The company is sought to be made liable upon the ground that it was the lessee of an unfenced railroad track and was running its cars upon it at the time plaintiff's animal was injured or killed. It is not claimed that any train, engine or cars of the railroad company killed or injured plaintiff's animal. This contention is denied, for the reason that the animal was not killed, or struck by any

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engine of any kind or character, or by any cars, or train belonging to or operated by the defendant railroad company, and this being an admitted fact, defendant company insists that it is not liable for the value of the animal killed or injured. The facts out of which this lawsuit arose are substantially as follows: In October, 1912, the Chicago, St. Louis & New Orleans Railroad Company was the owner of a line of road from Dyersburg, Tennessee, through Tiptonville, Lake County, to Hickman, Kentucky; that it was the owner of a branch road leading from a point near Dyersburg to Tiger Tail, a small village in Dyer County. It had leased the main line, and also the branch road to Tiger Tail, to the defendant railroad company, and at this time it was operating its train of cars on both the main line and the branch road to Tiger Tail. It does not appear that the owner of the road was operating any cars upon it, but it is presumed from the evidence that it was not, but it was then being operated by the defendant company. The track on the Tiger Tail branch was not fenced, as provided might be done by the Act of 1891, chapter 101. At the time plaintiff's animal was killed, or injured, under some kind of an agreement with the defendant railroad company, the Mengel Box Company, the Ferguson-Palmer Company and the Henning-Scott Company were running, or operating cars on this Tiger Tail branch. Just what kind of cars the other two companies were running on it is not shown, but the car operated by the Mengel Box Company was a motor car, which was about six feet four inches long, weighed about fifteen hundred pounds, carried four passengers, was propelled by a gasoline engine, and was a three and a half horsepower. This engine had on its front an acetylene gas light. It was this motor car, propelled by this engine that ran upon and injured plaintiff's colt, on one night in October, 1912, about seven o'clock.

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There were three persons in the motor car when the accident occurred. Mr. Pollard, who was sued, was sitting in the rear seat, and had nothing to do with the control or management of the car. It belonged to the Mengel Box Factory, who owned and operated a large box factory near Tiger Tail. Mr. Pollard was the foreman of the box factory, while Mr. Chapman, another employe of the box factory, was sitting on the front seat with a Mr. Miller, guiding and controlling the motor car at the time the animal was struck. At the place where it was injured, the railroad track was not fenced, and the evidence shows that the defendant Pollard was simply riding in the motor car on the back seat, and had nothing to do with its operations. The evidence also shows that Mr. Chapman was on the front seat, controlling and managing the car. The record fails to show who Mr. Miller was, or why he was on the motor car. As we have said, this motor car did not belong to the defendant railroad company, was not its property, and the persons controlling, operating and managing it were not in its employ, but in the employ of the box factory, to whom the motor car belonged.

The warrant notified the railroad company to appear and answer for killing one sorrel filly colt on the railroad track between Dyersburg and Tiger Tail, on October 13, 1912. It appeared and answered this averment in the warrant, and the plaintiff's own proof showed that none of the employes of the defendant railroad company had anything to do with the killing of his animal, but that it was killed by the employes of the Mengel Box Factory. It is insisted by plaintiff's learned counsel that the fact that the defendant railroad company was then the lessee of the railroad, and were then operating its trains over it, together with the fact that it permitted the Mengel Box Factory to operate its car over it, in connection with the further fact that

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the track was not fenced at the place where the animal was killed, makes the defendant railroad company liable to him for the value of his filly. In other words, the insistence is, that there is an absolute liability upon some one for the value of this animal, because the track was not fenced at the place where it was injured; that the railroad company is liable because it was then the lessee, and operating the road, and these facts being true, it makes no difference what company killed or injured the animal, whether the railroad company or the Mengel Box Factory, there is an absolute liability on the part of the former company to plaintiff. The question is one of first impression in this State, since the passage of the fencing Act of 1891. Before the passage of that Act, it is clear that the defendant railroad company would not be liable for the value of the animal killed, unless the injury was inflicted by the negligence of some of its employees.

In *Railroad v. Carroll*, 6 Heisk., 347, the Supreme Court, speaking through Mr. Justice Freeman, said: "If a train of cars of one railroad company is running on the road of another company, but under the exclusive control of the servants of the latter, the latter is liable for all damages occurring through negligence." Under the holding of that case, the fencing statutes being out of the way, the defendant railroad company would not be liable for an injury inflicted by the negligent acts of the employees of another company while running its trains, or cars, or engines upon the road or track of the former company. In such case, the company whose employees inflicted the injury would be liable, and not the company over whose road they were operating a train of cars or engines. In other words, the company would alone be liable whose employees negligently caused the injury. In this case, the Mengel Box Factory was operating a car on a track leased by the

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defendant railroad company. This track was not fenced. While so operating one of its cars, its employes ran upon and injured, or killed, the plaintiff's animal. If it was killed or injured, that act was committed by the employes of the box factory, and not by any of the employes of the railroad company. Does the fact that the railroad company, which then had the railroad leased, had not fenced the track, and was then permitting the Mengel Box Factory to use its then unfenced track, make the defendant railroad company liable for the injury to the animal? The company is not required to fence its track. It is only exempt from liability if the track is enclosed by a good and lawful fence, and good and sufficient cattle guard. If thus enclosed, no company using the track is liable for an injury to stock upon it. The writer is of the opinion that, as the defendant company is not required to fence its track, it is only liable for the value of such stock as its servants kill or injure while operating its trains of cars and locomotives over the track. If it permits another company to run its cars over the track, that other company is liable for whatever injuries it, or its employes may inflict upon the animals of another. This is in harmony with the holding of *Railroad Company v. Carroll, supra*, which makes the company liable whose employes negligently inflict the injury. In this case, there is no doubt but the injury was inflicted by the employes of the box factory. The use by it of an unfenced railroad track creates absolute liability against it for any injuries inflicted by its employes while operating its cars upon such unfenced track. Both companies—that is, the defendant railroad company and the Mengel Box Company, were lessees, and as such, running their cars upon the railroad track, and if either inflicted an injury while so doing, the one guilty of the tort is alone liable for it. In this view

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of the case, the defendant railroad company is not liable for the value of plaintiffs' animal, killed at the time, and as alleged in the proof.

Again, we are of the opinion that where the plaintiff in his warrant avers that an injury was inflicted by the defendant, and seeks to recover because of such an injury, he must prove that the defendant, charged with committing the tort, was guilty of the act averred in his warrant. In this warrant, the charge is, that the Illinois Central Railroad Company killed plaintiff's "sorrel filly colt," while the proof show that it was killed by the Mengel Box Factory Company. There is a variance between the averment in the warrant and the proof, and for that reason the plaintiff cannot recover in this case. If it was sought to make the railroad company liable for the value of the animal, upon the ground that it was the lessee of the track and upon the further ground that it had not fenced it, and upon the further ground that it had leased it to the box factory people in its unfenced condition, and that under these circumstances the animal was killed by the acts of the employes of the box factory, the warrant should have contained such averments as would put the defendant railroad company upon notice of the grounds upon which liability was sought to be fixed upon it. This warrant does not give the railroad company such notice as it was entitled to have, and for that reason any proof which showed the employes of any other company committed the tort, other than the employes of the defendant railroad company, was a variance. Upon this ground we are of the opinion that plaintiff is not entitled to recover. Upon the further ground that the railroad company is not liable for an injury committed by a car under the control of employes of another company, although it was running upon an unfenced track, the writer is of the opinion that the Act of

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1891, when properly constructed, does not hold the railroad company liable in a case like this. The caption of that Act sets forth its purposes, and among other things it is, "to make railroad companies liable for all damages by reason of the killing or injuring of live stock upon, or near their unfenced tracks, by *their* moving trains, cars or engines." It is clear that the object sought by this enactment was to make railroad companies liable for stock killed by *their* moving trains, cars or engines. It is not the purpose of this Act to make railroad companies liable for stock killed or injured by the moving trains, cars or engines of *other companies*, though the same be, at the time, running upon another's track. If another company is running its train of cars, or engines, upon a track owned or leased by it, *it is alone liable* for the injury it inflicts. Each company is liable for stock killed or injured, on unfenced tracks, by its own moving trains, cars or engines, and not for stock killed by the moving trains, cars or engines of another. The logic of the position assumed by plaintiff's counsel would hold the owner of an unfenced railroad liable for stock killed by its lessees, while the writer thinks the lessee itself, if the stock is killed or injured by its moving trains, cars or engines, is liable for such injuries, and not the owner of the road. The writer is clearly of the opinion that the Act of 1891 only makes that company liable for killing or injuring stock upon unfenced tracks, whose moving trains, cars or engines kill or injure such stock. He thinks such is the correct construction of the Act in question. However, the entire Court is of the opinion that defendant railroad company is not liable in this case, because plaintiff's warrant is not sustained by the proof; or in other words, that there is fatal variance between the averments of the warrant and the proof; that proof of the killing of the stock by the

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Mengel Box Company does not sustain the averment that the animal was killed by the defendant railroad company.

The writer is further of the opinion that the motor car which inflicted the injury upon plaintiff's animal, was not such a moving train, car or engine as is mentioned in the Act of 1891. The writer is of the opinion that the cars, or engines mentioned in that Act are such cars and locomotive engines as were, at the date of the passage of the Act, in universal use upon railroad tracks, and not such a car as is described in the record. The caption mentions, "moving trains, cars or engines." The first section of the Act calls for "moving train of cars, or locomotives upon an unfenced railway." The second section says, "whenever such killing or injury is caused by any moving train, or engine, or cars, upon such track, the company owning or operating said railroad is liable." He thinks that the engine or car mentioned in the Act of 1891 was such engine or cars or trains as was then used upon railroad tracks, and has no reference to a motor car a little over six feet long, and capable of carrying only four passengers, moved by a gasoline engine. The engine mentioned in the Act, in his opinion, clearly has reference to the usual and ordinary locomotive engines upon railroad tracks, such engines as are used to pull trains of cars upon such tracks, and not small affairs like a motor car. The purpose of the Act of 1891, and the end sought by that Legislature is to prevent accidents upon railways, "resulting to live stock killed or injured by moving engines or cars." The liability resulting from a failure to fence the road was not imposed in the interest of the owners of animals, but in the interest of the general public who were concerned that accidents be few and public travel made safe as against the exigencies of such transportation. The engines mentioned in the Act were those of enormous power and great momentum, which

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“rendered such protection a reasonable requirement against the unnecessary destruction of private property, and accidents to persons traveling by such conveyance.” 91 Tenn., 495, 496. At the time this Act was passed in 1891, it is doubtful if such a machine as a motor car was then thought of, and it is certainly true that it was unknown to the people of Tennessee; and, therefore, the Legislature could not have had in mind a gasoline engine, propelling a motor car of the description of the one which injured plaintiff’s animal. The writer, after carefully considering the Act of 1891, is of the opinion that it does not apply to such a car, or such engine as injured plaintiff’s animal. The majority of the Court, however, do not concur in this view, but agree that the motion for a directed verdict should have been sustained, because the proof failed to connect the defendant railroad company with the injury or killing of plaintiff’s animal. The writer is of the opinion that upon all the grounds mentioned herein, the motion should have been sustained. It results that the judgment of the lower Court is reversed and the cause dismissed.

Loving v. Dugan.

JAMES LOVING v. R. H. DUGAN.

Writ of certiorari denied by the Supreme Court.
(*Knoxville*. September Term, 1913.)

1. WRIT OF ERROR CORAM NOBIS. *Purpose of writ.*

A writ of error *coram nobis* lies only to correct errors of fact occurring in or arising in proceedings of the Court in which the writ is filed; and it extends to such errors of fact only as materially affected the proceedings and of which the petitioner had no notice, or which he was prevented from counter-acting by surprise, accident, mistake or fraud, unmixed with fault or negligence of his own or that of his counsel.

2. SAME. *Not allowed to correct mistake of counsel.*

This writ cannot be used to reverse a judgment upon the ground that the counsel of the petitioner failed to introduce material witnesses by whom petitioner claims the contrary of the finding of the Court could have been established. In the absence of fraud upon the other side, he must abide the consequences of the conduct of his chosen counsel.

FROM LOUDON COUNTY.

Appeal in error from the Circuit Court of Loudon County. SAM C. BROWN, Judge.

J. L. NICHOLAS for Plaintiff in Error.

JOHN J. BLAIR for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS is an appeal in error from the judgment of the Circuit Court of Loudon County, sustaining a demurrer

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to the petition of the plaintiff in error for a writ of error *coram nobis*, and dismissing said petition.

The petition averred, in substance, that the defendant Dugan, on the 8th day of February, 1912, in said Circuit Court, obtained a judgment against the plaintiff in error for the sum of \$100.00 and costs of suit; that said action and recovery were based upon the ground that a mare belonging to the defendant in error had been injured through the negligence of the plaintiff in error in so operating his automobile as to frighten another horse, and causing said horse to run against the mare of the defendant in error and injure her; that said suit for damages to the mare had been instituted before a justice of the peace of Loudon County, where the same was tried and dismissed by the justice, and appealed to the Circuit Court by the defendant in error, where the same was tried and resulted in the judgment aforesaid; that the plaintiff in error had employed and paid one Frank R. Harrison, a solicitor of the Court, to represent and defend him in said damage suit, and not being a necessary witness in his own behalf, he went to the State of Florida for his health, and was in the State of Florida when said damage suit was tried; that at the trial in the Circuit Court the said Harrison was present, but did not introduce the witnesses of the plaintiff in error by whom plaintiff in error expected to and could have proven a complete defense to said action; that the claim of negligence upon the part of the plaintiff in error in the operation of his automobile was wholly false, as well as the claim that the horse which ran against the mare of the defendant in error and injured her was frightened by the operation of said automobile, but that as a matter of fact his automobile was nowhere in the vicinity of the accident when it occurred, and that these facts could have been proven by any one of the four witnesses referred to, and

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by all of them; but that said Frank R. Harrison, plaintiff in error's attorney, in utter disregard of his duty, and without the fault of the plaintiff in error, failed to call said witnesses and introduce them on his behalf, or offer any evidence whatever as to the true facts bearing upon said alleged accident and injury; that by reason of said failure a verdict and judgment was rendered against him for the amount already stated.

The petition further avers that when knowledge of said verdict and judgment reached the plaintiff in error, he being still in the State of Florida, the Court had adjourned for the term, and the injustice of said verdict and judgment, which were wrongful and erroneous in fact, could not be brought to the attention of the Court by a motion for a new trial.

The prayer of the petition was for a writ of error *coram nobis*, to be issued upon the proper fiat of the Court; also for a writ of supersedeas, and to have said judgment corrected and set aside.

The petition was sworn to by one Dan Fine, as the agent of the plaintiff in error, who made oath that the facts set forth in said petition were within his knowledge, and that he was authorized to act for the plaintiff in error in filing said petition, it appearing that plaintiff in error was still in the State of Florida at the date of the filing of said petition.

Assignments of error were filed upon said petition on May 27, 1912, which embraced, in substance, the grounds for relief set out in the petition.

On June 10, 1912, defendant in error filed an answer to the assignments of error, averring that the injury to his mare was occasioned by the negligence and wrongful acts of the plaintiff in error; that the plaintiff in error's failure to make any defense which he might have had to said suit

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for damages, was due to his own negligence; that he was not prevented from making said defense and showing the facts alleged in his petition, to the Court and jury, by the negligent and fraudulent conduct of his counsel, Frank R. Harrison; that petitioner was not necessarily in the State of Florida for his health; but upon the other hand, petitioner knew when Court convened and should have been present and presented his defense to said action, if any he had. The answer further denied that there was any mistake of fact or error in said judgment that could be corrected by a writ of error *coram nobis*, or that would justify the application for said writ.

On May 29, 1913, the defendant in error, by leave of the Court first had and obtained, withdrew his answer and filed a demurrer to the petition, averring, among other things:

(1) That the petition did not allege that he (defendant), or any one representing him, was in any way responsible for the plaintiff in error's failure to make proper defense to said damage suit.

(2) That the averments of the petition show that the plaintiff in error himself was guilty of negligence in not making said defense.

(3) That no facts are alleged in said petition that would justify the sustaining of the petition for a writ of error *coram nobis*, or the setting aside of said judgment.

The demurrer was sustained by the Court, and the plaintiff in error's petition and assignments of error were dismissed, and he has appealed to this Court as already stated, and has assigned errors.

The first error assigned is to the effect that the Court below erred in granting the application of the defendant to withdraw his answer and file a demurrer to the assignments of error based on said petition.

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We are of opinion that there was no error in this action of the Court. This was a matter within the sound discretion of the Court. The plaintiff in error was not prejudiced by the filing of the demurrer, which, we think, was properly filed to test the sufficiency of the petition and assignments of error, both of which, we think, were insufficient to entitle the plaintiff in error to the relief sought, for the reasons to be hereinafter stated. The demurrer had the effect to bring the cause to a speedy determination, and to save further trouble, delay and expense. If the case had proceeded to a trial the Court would have had to finally pass on the sufficiency of the petition and assignments of error any way. Therefore, as already stated, we do not think that the plaintiff in error was prejudiced by the action taken.

It is next insisted that the Court committed error in not taxing the defendant with the costs of the cause accruing subsequent to the filing of the answer. That this should have been done as a condition precedent to filing said demurrer.

We are of opinion that there was no error in this action of the Court. The record fails to disclose what costs, if any, had accrued between the date of the filing of the answer and that of filing the demurrer.

It is next insisted that the Court committed error in sustaining the demurrer, but the specification fails to point out in what particular and for what reason the Court erred.

We are of the opinion that the demurrer was properly sustained. The relief for which a writ of error *coram nobis* will be granted is confined to errors of fact occurring in proceedings of which the person seeking relief has had no notice, or which he was prevented by disability from showing or correcting, or in which he was prevented from

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making defense by surprise, accident, mistake, or fraud, without fault on his part. Shannon's Code, section 4844.

The petition shows that the plaintiff in error had actual notice of the damage suit. He was under no disability—his defense was plain and adequate. He went to Florida and left the suit wholly in the hands of his counsel to conduct as his best judgment might dictate to him. In not introducing the four witnesses mentioned in the petition counsel may have acted upon his best judgment, and may have had some good reason for not introducing them. It is not alleged in the petition that plaintiff in error's counsel acted collusively with defendant or defendant's counsel, or that he was prevented from introducing said witnesses on behalf of the plaintiff in error by any fault of the defendant or his counsel. The failure of the plaintiff in error's counsel to introduce the witnesses and make defense for him in said damage suit, is not a fraud in the sense of the statute. The statute has reference to fraud practiced by the opposing party, or for his benefit, which misleads or prevents the party from making his defense. The plaintiff in error saw proper to rely solely upon his counsel to make the necessary defense for him, and his counsel having failed to do so, and there having been a trial for the damage suit on the merits, the proceeding for a writ of error *coram nobis* is not available to contradict the facts passed upon on said trial. *The Memphis German Savings Institution v. Charles J. Fargan*, 9 Heis., 496, and the authorities there cited.

If a party could have the benefit of the writ of error *coram nobis*, because of his counsel's failure to introduce material witnesses in the trial of a cause, wherein judgment had been rendered adverse to him, many applications could and would be made, and there would be no end to the setting aside of judgments for such reasons. Litigants

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must be held to the exercise of reasonable diligence, and where they employ counsel and leave them to conduct their lawsuits without their presence, they cannot urge the omissions of counsel as a ground for setting aside an adverse judgment by suing out a writ of error *coram nobis*.

The judgment is affirmed with costs.

JOHN L. WILLIS, TRUSTEE, v. ADALINE RUST, ET AL.

(September Term, 1913.)

1. REGISTRATION OF DECREES DIVESTING AND VESTING TITLE TO LAND. *Necessity for, as to creditors of former owner. Construction of Shannon's Code, section 3697, sub-section 18, and sections 3749 and 3752.*

Under the provisions of Shannon's Code, section 3697, sub-section 18, providing for the registration of certified copies of decrees divesting and vesting title to land, and section 3749, referring to section 3697 and its sub-sections, and providing that "All of said instruments shall have effect between the parties . . . without registration; but as to other persons . . . only from the noting thereof for registration"; and section 3752, still referring to section 3697 and its sub-sections, and providing that "Any of said instruments not . . . registered, or noted for registration shall be null and void as to existing or subsequent creditors of, or *bona fide* purchasers from, the makers without notice", it is necessary for a certified copy of a decree in equity to be registered in the office of the register of deeds that it be effectual as against creditors of the party whose title has been divested.

2. SAME. SAME. *Construction of Shannon's Code, section 6301.*

Shannon's Code, section 6301, providing that a decree may divest title "out of any of the parties, and vest it in others, and such

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decree shall have all the force and effect of a conveyance by such parties, executed in due form of law", does not dispense with the necessity of registering a copy of a decree divesting and vesting title to realty to make such decree effective as to the creditors of the former owner, as it does not attempt to give greater effect to such decree than that of an executed, not registered, conveyance.

3. REGISTRATION. *Statutory origin and control.*

The practice of recording instruments is of purely statutory origin, and the statutes providing therefor alone determine what shall be registered and the effects of registration.

FROM WARREN COUNTY.

Appealed from the Chancery Court of Warren County.
V. C. ALLEN, Chancellor.

JNO. L. WILLIS for Complainant.

WHITSON & MERCER for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

COUNSEL representing opposing interests in this cause practically concede that the disposition of the cause depends upon but one legal proposition, viz.: Is it necessary for a certified copy of a decree in equity divesting and vesting title to lands to be registered in the office of the register of deeds that the decree be effectual as against the creditors of that party whose title has been divested, just as a deed executed by such party must be registered? Or is such decree, without such registration, as to such creditors, to stand on the same basis as a duly registered deed? The Chancellor held that, for such decree to be

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effectual as to creditors of the former owner, a certified copy thereof should be registered, just as a deed executed by him would have to be registered; and from that holding the case was appealed to this Court.

The facts giving rise to these questions are fully set out in the opinion filed with the record in the cause, but it is not deemed necessary to set them out in this published opinion. They are, therefore, omitted.

By Shannon's Code, section 3697, subsection 18, it is provided as follows: "The following writings may be registered: . . . (18) Certified copies of decrees divesting the title of land out of one person and vesting it in another."

Section 3749, referring to section 3697 and its subsections, provides as follows:

"All of said instruments shall have effect between the parties to the same, and their heirs and representatives, without registration; but as to other persons, not having actual notice of them, only from the noting thereof for registration on the books of the register, unless otherwise expressly provided."

And section 3752, also referring to section 3697 and its subsections, provides as follows: "Any of said instruments not so proved, or acknowledged and registered, or noted for registration, shall be null and void as to existing or subsequent creditors of, or *bona fide* purchasers from, the makers without notice, and, in case of marriage contracts, shall be void as to existing or subsequent creditors of the husband, or purchasers from him without notice."

Counsel for the creditors insist that, by virtue of these provisions, an unregistered decree divesting and vesting title can have no more effect as to creditors of the debtor whose title had been divested by the decree than an unregistered deed; and in this connection it must be borne in

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mind that creditors of a vendor stand on a much higher plane than his vendee. Creditors, by the express provisions of the statutes, are not affected by notice of an unregistered deed, while purchasers are. As said by Justice Neil in *Wilkins v. McCorkle*, 4 Cates, 688, 704: "As to creditors of the vendor and purchasers from him without notice, the deed or other instrument in question must be treated as non-existent"; and this is true as to subsequent as well as existing creditors by the very terms of the statutes. As said in *Campbell v. Ice & Coal Co.*, 18 Cates, 524, 530: "Any deed not proved or acknowledged, and recorded or noted for record, is null and void as to existing or subsequent creditors, or *bona fide* purchasers from the maker without notice."

According to the literal language of the sections of the Code hereinbefore set out, "All of said instruments," and "Any of said instruments," include decrees or copies of decrees, and in order for them to have effect as against creditors, under that language and under our holdings, they must be registered. However, counsel for appellant insist that by virtue of Shannon's Code, section 6301, and certain holdings of our Supreme Court construing that section, decrees divesting and vesting title, duly entered, being matters of public record, need not be registered to become operative against creditors, and that therefore the holding of the Chancellor in the instant case was erroneous. The section of the Code thus relied on provides as follows:

"The decree may divest the title to property, real or personal, out of any of the parties, and vest it in others, and such decree shall have all the force and effect of a conveyance by such parties, executed in due form of law."

It is seen that this section does not attempt or purport to give any greater force and effect to a decree divesting

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and vesting title than that of a conveyance "*executed in due form of law*"—that it does not attempt or purport to give to it the effect of a conveyance *registered* after duly executed, and that therefore there is no conflict between this section and section 3752. The two sections of Shannon's Code immediately following the one last quoted lend aid to the view that the mere decree affecting title is not within and of itself to have effect as a registered instrument section 6302 authorizes the appointment of a commissioner to execute conveyances either in his name or in the name of the parties, and provides that "the instrument so executed will be as valid as if executed by the party," thus giving to it only the effect of a deed *executed* by the party—not the effect of one executed by him *and registered*; and the next section, 6303, provides, with reference to such order directing a conveyance, that if the conveyance is not executed "in the time specified in the decree, or in a reasonable time, if no particular time is thus specified, the decree operates in all respects as if the conveyance . . . was made," thus again showing that the decree has only the effect of a conveyance—not that of a conveyance duly registered. But in a note found in Shannon's Code, under section 3301, it is said: "Such a decree is as effective as a duly acknowledged and registered deed to transfer title"; and this note is relied on by counsel for appellant.

First, it will be observed that Mr. Shannon in the note is speaking only in general terms of the effect of the decree "*to transfer title*," and not specially of its effect as between the creditors of the original owner and the party vested with title; and while the broad language used by him might be taken to include such creditors, the terms he uses must be construed in the light of the cases he cites in support thereof. We will now refer to these cases,

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which are also, with others, relied on by counsel for appellant.

The first of these cases is that of *Vaughn v. Vaughn*, 12 Heisk., 472. In that case lands had been sold for partition and the title divested out of the former owners and vested in the purchaser. Creditors of the purchaser thereupon levied on the lands before the purchase money had been so paid as to discharge the lien on the lands therefor. It was therefore held that a lien existed on the land for this purchase money superior to the rights of the levying creditors, who themselves became purchasers at a sale under the levy, and, of course, took subject to the lien; and the fact that the lien was held to be superior to the rights of these purchasing creditors is relied on as showing that they were chargeable with notice of the decree retaining a lien just as they would have been chargeable with notice of a registered deed. This conclusion is not legitimate. Of the position of these purchasers it was said in that case: "It is impossible that" the purchasing creditors, "being judgment creditors, and purchasers in satisfaction of their judgment, could occupy the position of purchasers for valuable consideration without notice . . . the pendency of the suit in the Chancery Court at the time the executions were levied on the lands was notice to the creditors"; so that it was not the fact that a decree stood on the basis of a duly registered deed that gave notice to the levying creditors who became the purchasers, but the fact that they purchased the property while the suit in which it was sold was still pending that gave them notice. In other words, the question was one for the application of the rule of *lis pendens* which makes all purchasers of property involved in litigation take with notice of suit, and the case is not at all authority for the contention made on behalf of appellant.

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The next case cited by Mr. Shannon in his note, and also relied on by appellant, is that of *Martin v. Nesbit*, 2 Pickle, 383. In that case, purchasers from a vendor who had acquired his title at a Court sale claimed to be innocent purchasers in so far as they could be affected by a lien retained for the purchase money in the decree vesting their vendor with title. It was held that this contention was not sound, for the reason that the purchasers—not creditors, it will be borne in mind—were chargeable with what was disclosed in their chain of title, and that the decree vesting their vendor with title, being a part of their chain of title, they could not deny being purchasers with knowledge of its recitals. In that case, on this question, it was said:

“It is utterly impossible for them (the purchasers) to trace their chain of title beyond their immediate vendor without coming face to face with the lien. In the case of *Nelson v. Allen & Harris*, 1 Yer., 366, this point was expressly ruled. After a most learned discussion and analysis of the cases, Judge Whyte concludes as follows: ‘These cases prove that a purchaser of land is bound to take notice of every deed necessary to make out his title, and if his title-deeds disclose his antagonist’s title, he is affected with notice of it.’

“The language quoted nor the authorities relied on by the Judge, do not proceed upon the idea of registration laws—for all the authorities are English—but upon independent principle.”

So it will be seen that the question of the effect of registration or non-registration of a decree is in no sense involved in that case.

The next case cited by Mr. Shannon in support of his note, and also relied on by appellant, is that of *Bleidorn v. Pilot Mountain C. & M. Co.*, 5 Pickle, 166. In that case

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it was simply held that one holding under a decree must be treated just as if holding under a deed *in the sense of our champerty laws*, not of our registration laws. In other words Shannon's Code, section 3174, providing that the provisions against champertous sales shall not prevent "a sale and conveyance by a non-resident of this State, of lands which said non-resident may own, and of which lands no person, at the time of such sale, holds adverse possession by deed, devise or inheritance," was there involved, and not the Code provisions involved in the case at bar. The reason for that holding, as explained by our Supreme Court, was that the deed of the non-resident should be good when the lands so deeded were not being held under color of title, and that as a decree was a color of title, it was within the intent of the statute; and no question of registration was at all involved. As further evidence of the fact that the question now at issue cannot be affected by that holding, we call attention to the fact that at the time of the passing of the champerty statutes, and at the time of the decision of the Bleidorn case, registration was not necessary to constitute a color of title; and, under the holding of the Court, the statute exempting deeds from the operation of the champerty provisions simply meant that those provisions should not apply when lands were not being held under any color of title.

These are all the cases cited by Mr. Shannon in his note in support of his proposition, but counsel for appellant in the instant case cite other cases in support of their contention, particularly the case of *Wilkins v. McCorkle*, 4 Cates, 688, to which we have already hereinbefore made reference. With regard to the feature of this case relied on by appellant, it can be said that the reference there made to the effect of a decree divesting and vesting title without registration was not applied to creditors, but to

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parties standing in the position of purchasers. The language relied on is found at page 706 of 4 Cates, and in the very connection in which it is said that, "Such conveyances," referring to decrees divesting and vesting title, "need not be recorded in the register's office in order to be effective. Their entry upon the record books of the Court in which they are rendered is sufficient, answering all the purposes of a registration," attention is called to the fact that those who were claiming under the decree there involved had no notice of the rights that others were seeking to assert against them, and that the burden was on such others to show they had no such notice, thus showing conclusively that they were treated as standing in the position of purchasers and not creditors, because if they had stood on the plane of creditors, the question of notice or no notice would not have been material. Further, on the same page and at the bottom thereof (4 Cates, 706), it is expressly said that the parties claiming under the decree must be treated as purchasers. It follows, this case is not authority for the position in support of which it is cited by appellants.

Other cases are cited, but they are not sufficiently in point to make it necessary to review them; and the result is that no case has been cited that militates against the holding of the Chancellor in the case at bar; and it can be further said that this Court as a result of its careful examination of our cases has found none so holding. So it is, the language used by Mr. Shannon in the note relied on by appellant does not, either in its language or in the cases cited in support of it, support the contention made here on appellant's behalf. And the same is true of the only other authority cited by Mr. Shannon, which is 8 Am. & Eng. Encyc. of Law (old Ed.), 273. No statement is found there that would even tend to support the

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contention. It might be here said that the practice of recording instruments is purely of statutory origin (24 Am. & Eng. Encyc. of Law, 2d Ed., 77); and it follows that, as to what shall be registered or recorded, and the effects that registration of any instrument or document shall have, the statutes of each jurisdiction providing therefor must be alone looked to to determine the law therein, and cases or authorities not construing the particular statute in question, or one exactly to the same effect, can have but little weight. However, it can be here remarked that the practice of providing for the registration of titles derived from judicial sales, or which depend on judgments and decrees, appears to be general among the States of the American Union (*Coal & Iron Co. v. Gardner*, 131 Ga., 599; *Owsley v. Bailey*, 111 Ga., 783; *McGinnis v. Coldwell*, 71 West Va., 375; *McNitt v. Turner*, 16 Wall (U. S.), 352; 24 Cyc., 66; 24 Am. & Eng. Encyc. of Law (2d Ed.), 72-79), and the conclusion we have reached appears to be in harmony with the trend of legislation in the United States.

It follows, under the express provisions of our statutes hereinbefore quoted providing for registration, and stipulating as to its effects, we are of the opinion that the decree of the Chancellor is correct, and must be affirmed, and it is so ordered.

CASTLE HEIGHTS SCHOOL v. J. G. RUSS.

Writ of error denied by the Supreme Court.

(*Nashville*. December Term, 1913.)

1. CONTRACTS, CONSTRUCTION OF. *Special contract made in contra-
vention of a general rule limited to its precise terms.*

C. was conducting a school, furnishing tuition, board, etc., at a fixed sum for the school year, and issued a catalogue covering two years announcing that no deductions would be made for withdrawals of pupils except in cases of protracted sickness. R., having seen the catalogue, entered a son as a pupil in January, at the middle of the first school year, but on a specific contract to pay for only the time the son actually attended the school, the contract being entered into because the son's health had been poor, and it was feared he might not be able to stay the entire spring term, but he was able to, and did stay in school till the term closed. He was entered as a pupil at the beginning of the second school year, which began the next September, but without anything more being said as to a special contract. *Held*, The special contract was limited to the term at which the son entered the school, and did not affect the terms for the next year, they being controlled by the catalogue announcement.

2. COMPROMISE. OFFER OF. *When will not affect rights of creditor.*

A creditor will not be prejudiced in his rights as such by sending to his debtor a statement of his account showing a less amount than that really due, and offering to take in settlement a less amount, when in doing so he makes known that his effort is to settle by compromise and without suit, and that if suit has to be brought he will sue for the full amount. In such case if the offer to settle on the smaller amount is not accepted the debtor may maintain suit for the full amount of his claim.

3. SCHOOLS. CONTRACTS FOR BOARD, ETC. *An entirety and not
divisible, and service under not subject to rule of quantum
meruit.*

A contract entered into between a school and a parent by which the parent was to pay a fixed sum for the tuition, board, etc.,

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of a son for a year, and no deductions were to be made except in the one case of protracted sickness of the son, is an entirety and not divisible; and where the son is, during the year, expelled from the school because of his own fault, and does not thereafter attend, the school being ready to carry out its part of the contract, the parent is liable for the full year's charges, and cannot, on the principle of *quantum meruit*, settle by paying that portion of the year's charges represented by the time the son was in school.

4. EVIDENCE TO MINIMIZE LOSS. BURDEN OF PROOF. *On that party evoking the rule.*

That party to an action who seeks to rely on the rule that it is the duty of one about to sustain a loss because of the wrong of another to put forth all reasonable efforts to avoid the loss or make it as light as possible, has on him the burden of showing that such efforts would have been effectual, and in the absence of such showing will be responsible for all the loss.

FROM WAYNE COUNTY.

From the Chancery Court of Wayne County. W. S. BEARDEN, Chancellor.

R. M. SIMS for Complainant.

R. A. HAGGARD, ROSS & ROSS for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

I. W. P. BUCHANAN, L. L. RICE, O. L. SMITH and A. W. HOOKER, being engaged as partners in conducting an institution of learning at Lebanon, Wilson County, under the name of Castle Heights School, filed the original bill in this cause in the name of the school to recover from defendant J. G. RUSS an indebtedness of \$290.21 due

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them, as they claim, under a contract entered into between them and defendant, by the terms of which they should receive defendant's son, Matt Russ, into their school and furnish him instruction, board, room, heat, light, etc., for the school year of 1906-7. Defendant answered this bill, denying that he was indebted to complainants in any amount whatever.

That defendant's son entered Castle Heights School at its opening in September, 1906, is not questioned, but he was dismissed from the school in November thereafter, and it is the contention of defendant that his son entered school under a special contract, by which he, defendant, was to pay for only the time his son actually attended school. Complainants insist, on the other hand, that there was no such special contract as that claimed by defendant, but that under the contract no deductions were to be made for absence from or failure to attend the school except in cases of protracted sickness, and that therefore defendant is liable for the full year's charges.

The first matter of controversy to be settled is as to the terms of the contract under which defendant entered his son in Castle Heights School. Complainants had sent out catalogues announcing the terms and conditions of entering and attending the school for the years 1905-6 and 1906-7 in the following language: "For the school year of 1905-6 the charges are \$285. This amount pays for tuition, library, board, furnished room, hot and cold water, servants, heat and light. This does not include laundry, which is guaranteed to cost not over \$1.25 per month.

"There is but one other fee of six dollars to help defray expenses attached to maintenance of the new gymnasium.

"While the entire amount is due the first day of the term, September 6th, yet for the convenience of patrons we

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require only \$160 of this amount at the opening of school, the other 131 being due the last week in January. . . .

"As it is so easy to get our full complement of students, and as we must employ our entire force for the full school year, naturally we can make no deductions for withdrawals except in the one case of protracted sickness of the pupil."

Defendant admits that before his son entered the school he had read a catalogue announcing these terms. He claims, however, that he made a special contract under the following circumstances: He had a daughter in a school for young ladies at Lebanon, and while visiting his daughter some time previous to January, 1906, he had a talk with the complainants, Smith and Buchanan, about sending his son to their school for the spring term, beginning January, 1906, but was apprehensive that his son, whose health had been impaired, might not be able to stay during the entire term, and, therefore, reached an agreement, as he testifies, that he would enter his son and pay only for the time he attended school. Speaking of this special contract, he says: "I talked with (them) about sending my son there, and did not agree, on account of his health having been very bad for several years to obligate myself for the full year's term—that is, for the full spring term of 1906"; and, further, that his agreement with complainants was that he was to pay for the time only that his son was in school during that spring term of 1906. Under this special agreement, as he insists, the son entered school in January, 1906, and stayed during the entire term. In any event, the charges for that term were paid, so that no question arose over the son's attendance for that time. Thereafter, according to defendant's own swearing, nothing further was said about any special terms, and the son entered the school of the fall term, 1906. On this question defendant's testimony is as follows:

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"Q. 15. Upon what terms and conditions did your son enter said school at the beginning of the fall term 1906?

"A. There was nothing further said about any further contracts when he entered at the fall term.

"Q. 16. When he entered in January, 1906, how long, if at all, did you enter him for, or tell said Smith and Buchanan he would attend?

"A. I only entered him for the time he could stay in school, it depending on his health as to how long I could keep him there or how long he could stay.

"Q. 17. State whether or not there was any further contract or agreement of any kind were made between you and said Smith and Buchanan, or with anyone else on behalf of said school for the attendance of your said son at said school other than as you have above stated?

"A. There was not."

Complainant Buchanan denies positively ever at any time entering into any special contract with defendant; but complainant Smith, with whom defendant indicates he talked more fully than with Buchanan, admits that there was something said by defendant previous to the entry of his son in school in January, 1906, about his son's health; and when asked about a special contract being made with defendant, he swears that none was made so far as he remembered, and when again asked specially about the particular contract that defendant Russ swears was made, his answer is, "I remember of none." As the talk was more especially between defendant and Smith, it is likely Buchanan was not a party to all of it. We are of opinion he was not. All parties impress us as meaning to be perfectly frank and open about the whole matter.

In the light of what we have set out, and all the evidence in the record, we are of opinion and find that the

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special contract testified to by defendant was entered into between him and Smith representing complainants, and that it applied only to the 1906 spring term of the school, and had no application to the school year beginning in September, 1906; and we are of opinion and find further that when defendant entered his son in Castle Heights School in September, 1906, he entered him under the terms set out in the catalogue, which have been hereinbefore copied.

Some time in November, 1906, defendant's son, contrary to the known rules of discipline of the school, as the undisputed evidence shows, was guilty of offenses which justified his expulsion from the school, and after a hearing before the school authorities, in which he admitted his offenses, was dismissed, and did not thereafter attend. The father, the defendant, feeling, for the time at least, that his son had been too harshly dealt with, refused to pay anything for the services rendered to the son or on the contract entered into, and this suit was brought.

The Chancellor, on this state of facts, gave a decree for complainants for the amount due for the first term of five months less board for two and a half months at the rate of \$15 per month, it appearing that board had been furnished to the son for only about two and a half months of the first term of five months. Evidently the Chancellor found against defendant's contention as to the special contract's not applying to the school year of 1906-7, for if he had found with that contention there could have been no basis for finding any liability for the full five months. There is no pretense that the young man was in school beyond about the middle of November, or for about two and a half of the five months.

From the decree of the Chancellor complainants appealed, and have assigned errors, insisting that the contract was an entirety and that they are entitled to recover

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the whole amount contracted to be paid for the entire school year of 1906-7.

Before considering the legal rights of the parties growing out of the contract it is proper to dispose of a contention made by defendant's counsel to the effect that complainants, by their own statements of the account, rendered to defendant after the school year of 1906-7 had closed, recognized that defendant was liable for only half the charges for the whole year, or for the first term of five months only. That complainants did send a statement to defendant as late as June, 1907, seeking to collect only \$149.94, and that they did, about the same time, seek to have defendant sign a note for the same amount with another small item added, is not denied, but complainants say that the sending of this statement and the request made on defendant that he sign the note were in efforts to compromise the matter without suit; and, according to defendant's own testimony, the statement and note sent him, to use his language, "were the propositions made me of settlement"; and he admits that complainants did threaten that if they had to bring suit they would sue for the full amount they now claim. We think clearly defendant's own testimony shows that the statement sent him for a smaller amount than that now claimed, and the effort to have the note signed for a smaller amount, were parts of efforts to settle the matter by compromise and without suit, and that they cannot be taken as a confession that the amounts sought to be collected represented the full amount due.

Now, as to the rights of the parties under the contract:

In *Kabus v. Seftner*, 69 N. Y. Supp., 683, a tuition fee of \$200 had been paid by Kabus to Seftner and his co-defendants, in consideration of which they agreed to give private instruction to Kabus until he should receive forty-eight "academic counts" necessary to pass the re-

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gent's examination. Instruction was given till twenty-six of the forty-eight counts had been obtained, when, because of Kabus' fault, he was suspended from defendant's school. He sued for the \$200. The Court in which the suit was brought apportioned the \$200, allowing a recovery for the sum so paid which represented the counts not attained. The case was appealed and of the holding of the lower Court the Appellate Court said: "This was error. The plaintiff should have received all or nothing for the contract was entire and undivisible. The defendants agreed to qualify the plaintiff for a particular examination. If they failed to do that, they were entitled to no compensation. On the other hand, if the acts of the plaintiff prevented them from living up to their contract, he forfeited the entire amount paid for tuition. Under the contract in evidence, there could not be part performance and a partial recovery, on some theory of a *quantum meruit*. . . . The question before the justice was simply one of fact whether or not the defendants' refusal was caused by the misconduct charged against the plaintiff. If yes, they were entitled to judgment; if not, the plaintiff should have succeeded. In no event could there have been partial success for each."

That such contract is entire and cannot be separated and apportioned, is also held in *Starr v. Litchild*, 40 Barb. (N. Y.), 541. In that case Starr, as instructor or teacher, contracted to take into his home a son of Litchild, and, in addition to giving him instruction as a pupil of his school, to furnish him board, etc., at the price of \$150 for a term of twenty-two weeks, extending from November 1st to March 31st. The son was received and the instruction, board, etc., were furnished to him till January 25th, or more than half the time, when, by virtue of the teacher's fault, the contract was breached, and no further instruc-

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tion, board, etc., were furnished. It was held that nothing could be recovered by the teacher, the Court saying: "The contract is entire; it cannot be separated and apportioned, and the amount awarded to the plaintiff for the time he actually furnished board and tuition to the boy. He was to receive the entire sum of \$150 for the twenty-two weeks' board and tuition. Having refused to furnish it, he is not entitled to recover anything. He must recover all or nothing."

See also *Horner School v. Westcott*, 124 N. C., 518; and *Vidor v. Peacock* (Tex. Civ. App.), 145 S. W., 672, the last case having been decided as late as 1912, and both of which are in line with those just quoted from. In fact, no authority has been furnished to the contrary, and our own investigations of the law have failed to disclose any contrary authority.

The only argument made against holding with these authorities is, in effect, that it would be harsh to enforce in the instant case any such rule as that announced by them. In reply to this argument it can be said that while in some instances results more or less harsh would be worked, there are circumstances which make it less harsh than might at first appear. The proprietors of schools are put to the necessity of employing their forces of instructors, keeping up their properties, and otherwise equipping themselves for carrying out their contracts; and, in addition, they usually go to the expense of getting out catalogues and otherwise advertising; and for reimbursement of all of this outlay they must look to their patrons and enforce their contracts as made. To do less would necessarily hamper their undertakings and confuse and more or less cripple their business and make their schools less efficient.

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It is also suggested as a matter of defense that it was the duty of complainants to make their loss as small as possible by taking in another pupil in the place of defendant's son, but there is no character of evidence that this could have been done in the middle of the term or at any other time after the son was discharged, and we are of opinion that even if that rule could be applied the burden of showing that complainants could have thus protected themselves was on defendant.

In 1 Sedgwick on Damages (9th Ed.), section 227, it is said: "It has been repeatedly held that the burden of proof is always on the defendant to prove that the plaintiff might have reduced damages," citing cases from Alabama, Indiana and New York.

To same effect is 4 Encyc. of Evidence, 10, and notes; 13 Cyc., 192; and the late case of *Huntington Easy Payment Co. v. Parsons* (W. Va.), 9 L. R. A. (N. S.), 1130, directly so holds.

We are of the opinion the Chancellor should have allowed a recovery for the full amount of tuition, \$285, plus \$4.44 for laundering, it appearing that that amount actually accrued while defendant's son was in school; and that to this amount should be added the \$6.00 provided for in the contract for the maintenance of the new gymnasium; and that from the total of these amounts should be deducted the sum of \$5.23, the amount of an overpayment of charges for the spring term of 1906. This makes the sum of \$290.21 due at the time this suit was brought, and judgment will be entered here for that amount, and defendant will be taxed with the costs.

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Z. T. AND W. W. ATKIN v. H. S. SHENKER, ADMINIS-
TRATOR.

Writ of certiorari denied by the Supreme Court.

(*Knoxville*. September Term, 1913.)

1. MOTION FOR A NEW TRIAL, GENERAL OR SPECIAL.

A general motion for a new trial made in a Court which has no rule upon the subject, made within thirty days from rendition of verdict and pronouncing of judgment, has the effect of suspending the verdict and judgment so as to prevent the thirty-day statute from taking away the right of appeal, although more than thirty days after the rendition of first judgment a new motion for a new trial with specific ground is filed.

2. NEGLIGENCE. *Careless driving.*

The owners of a livery stable who have sent out a team and carriage in charge of a negro driver are responsible in damages for the running over of a child upon the street by the driver because of his inattention to his surroundings; and it is no defense that the child suddenly appeared in front of the horses if the servant, had he been awake and attentive, could have prevented the collision by the exercise of ordinary care.

3. SAME. *Contributory negligence of the infant. Question of law.*

The Court may as a matter of law declare to a jury that an infant three years of age is not chargeable with contributory negligence.

4. SAME. *Negligence of parent. Question of law instructions.*

It is not error in a trial Judge to state to the jury that if they believed that a parent suing for the wrongful killing of his child acted with such care and prudence as an ordinarily careful and prudent parent would have done under the circumstances, they should not hold the parent guilty of contributory negligence.

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5. INSTRUCTIONS TO JURY. *Compensation.*

It is not error for the trial Judge to omit from his instructions the word compensation if it is apparent that the jury understood that they were instructed to award a plaintiff such sum as the proof showed he was entitled to.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
V. A. HUFFAKER, Judge.

BURROUGHS & HODGES for Plaintiffs in Error.

JOS. W. SNEED and J. C. HARRIS for Dedendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of this Court.

THIS was an action by Shenker as administrator of his deceased daughter to recover of defendants below damages for the alleged wrongful killing of his intestate. It was tried by Circuit Judge and a jury. A verdict of \$1,000 was rendered. A motion for a new trial made by plaintiffs in error was overruled, and they are here assigning errors.

Preliminarily we must dispose of a contention to the effect that plaintiffs in error did not enter their motion for a new trial until after the expiration of thirty days from the date of the verdict. The predicate of this argument is an entry on the minutes of April 12, 1913, of an extended motion for a new trial, the verdict having been rendered on the preceding 3rd of March. A further examination of the transcript, however, discloses the fact

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that on March 5th plaintiffs in error entered on the minutes their formal motion for a new trial, coupled with a statement that the reasons for asking a new trial would be stated later. This Court must treat the motion for a new trial suspending the verdict as having been entered on March 5th, and not on April 12th. There was no rule of the lower Court requiring specifications of error. This Court did not at that time have in force any rule on the subject. To what extent we are bound by the new rules of the Supreme Court upon the subject of a new trial has not yet been determined.

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Mary Shenker was a small girl child a little under three years of age. She resided with her parents on Central Avenue. On the 4th of April, 1912, her father accompanied her on a trip to Chilhowee Park. Upon returning to the city they disembarked at the junction of Central Avenue and Park Street and went into a grocery on the former street for the purpose of making a few purchases. While going along the street, and while entering the store, and while therein up to the time of making some purchases, the father had hold of the child's hand. When his turn as a customer came he told the clerk what he desired and let go his clasp of the child for the purpose of taking out the money with which to pay for the things which he had bought or was about to purchase. The child turned from the father and walked to the front of the store and out upon the pavement. It seems that the little one took hold or was given some nuts which it dropped. One of the walnuts rolled off the pavement and some three or four feet into the street, and beyond the gutter line. She stepped over the curbing and went upon the street to get the walnut. She grasped it and turned to go back upon

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the walk, when she was run over by a team driven along the street by a servant of plaintiff in error. Very soon after the collision the little one died. During these minutes, the number of which is not exactly shown, the father was engaged in the store in the making of the purchases, and was not aware that his child had left the store and gone into the street.

As usual, the contending parties to this lawsuit had opposing theories as to the facts. It was urged by plaintiff below that his daughter had without his knowledge and without his lack of ordinary care strolled upon the public street and was in a position to be struck; that the servant of plaintiffs in error was driving his team at a brisk gait along this street with the reins over his head and without paying attention to the direction in which he was going or to the users of the street in front, being either drunk or almost asleep or grossly indifferent; that the child was on the street in striking distance and could and would have been seen by any driver of ordinary prudence while exercising ordinary care, and that this child could have been seen and would have been seen in time to have checked the horses and prevented collision; but that the servant of plaintiffs in error, in the condition before mentioned, negligently, heedlessly or recklessly drove the horses against the child and thus produced her death. It was further urged that the situation of the child was known to other parties on the street, and that they hallooed to the driver and notified him that there was danger ahead.

The theory of plaintiffs in error was that their driver, an ordinarily prudent one, was exercising ordinary care in driving on the street; that he was driving slowly and carefully; that the child was playing on the sidewalk or in the gutter and not in striking distance until it suddenly left the gutter and walked in between one of the horses and one

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of the front wheels of the carriage and was struck and injured. There was also their contention that defendant in error was guilty of such contributory negligence as to bar his right of action, and it was also urged that the child was guilty of contributory negligence in such a way as that the father should be held not entitled to a recovery.

It is plain that under the theory of the defendant in error there was liability, and that under the contention of plaintiffs in error there could be no recovery. It suffices to say that there was evidence tending to support every factor mentioned in our statement of the theory of defendant in error. This, of course, precludes us from setting aside this verdict or from holding as error the refusal of the trial Judge to grant the motion for peremptory instructions.

The first assignment made by plaintiffs in error in the lower Court to the effect that there was no evidence to sustain the verdict has coupled with it a statement which of itself shows that this Court is precluded from disturbing the verdict. This statement is to the effect that the verdict is based upon the evidence of a witness who is not worthy of credit. We cannot pronounce the testimony of even a discredited witness no evidence; nor is it ever our province to pronounce a witness unworthy of credit. That is the exclusive province of the jury.

But treating this assignment as a challenge to the sufficiency of the evidence to support the verdict, we are constrained to overrule it for the reasons which are apparent from the foregoing.

The second ground assigned in the motion made April 12th and the basis of the third assignment here is that the Court erred in giving in charge the following: "If the jury finds from the proof that an ordinarily prudent and careful person would not have apprehended, the child

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would escape and expose herself on the street while plaintiff was making purchases in the store, then plaintiff letting go of the child's hand temporarily, under the circumstances would not be negligence on the part of the plaintiff."

It is said that this was error for the reason in the first place that it was an assumption by the Court of the right to determine the question of negligence, whereas it should have been left to the jury. The correctness of the instruction as a proposition of law is also assailed. It will be observed that the Court does not undertake in this instruction to determine any disputed question of fact, all matters of fact being stated hypothetically. It is true that he does state that if certain things are found by the jury, they will also find that there was no negligence upon the part of the parent. But an analysis of this instruction will show that the Court simply told the jury that if they believed that Shenker did under the circumstances what any other ordinarily careful and prudent parent would have done, there was no negligence. And indeed all men must admit that under these circumstances there would have been no negligence. Hence it was the duty of the Court, or at least it was not error in him to so say. As a proposition of law, the instruction was entirely sound. We shall not elaborate on this, but shall content ourselves with reference to the case of *Dan v. Street Railway*, 15 Pickle, 88. The parallel between that case and this one is most striking, and counsel are asked to bear this case in mind insofar as it reflects upon the question of the negligence of the infant. Learned counsel for plaintiffs in error insist in their fourth assignment that His Honor should have given in charge the following request: "While the infant itself at its age cannot be charged with negligence, its negligence can be imputed to the child's father in the case, and he would be chargeable

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therewith, and if such negligence was the proximate cause of the injury or contributed thereto, then there could be no recovery."

If we treat this request as asking the Court to instruct the jury that the child would be guilty of negligence, we unhesitatingly pronounce it unsound. A child of three years of age or less cannot be charged with contributory negligence. This is an old and a universal rule: 29 Cyc., 537, 538. See our own case of *Wise v. Morgan*, 17 Pickle, 273. The authorities urged to the contrary, if we were to treat them as deciding the opposite view, cannot be approved. If we treat this as a request to the effect that the father might be charged with negligence in his care of the child to such an extent as that his right of action as beneficiary might be barred, we readily assent to its soundness. But upon examination of the charge as given by the Court we find that the jury were repeatedly instructed that if the father was guilty of negligence with respect to his care and custody of the child, and that this contributed proximately to the injury, there could be no recovery. The trial Judge likewise gave plaintiffs in error the benefit of every contention which they made or could really urge here in bar of the action because of the negligence of the parent, and was not in error in declining this request if considered as in every respect sound as to the contributory negligence of the parent. We feel constrained, notwithstanding the earnest argument of learned counsel, to overrule this assignment of error.

In the second assignment of error here and the third specification of April 12th, it is said that the Court erred in giving the following instruction: "If the jury find in favor of the plaintiff, then they will assess the damages in such amount as in their judgment the plaintiff was justly entitled to recover, the amount in no event to exceed the

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sum sued for, and may be for any amount within the sum sued for." The insistence is that the Court should have laid down in explicit terms the rule that plaintiff was to be compensated by the jury, and that the jury was to arrive at this compensation by an examination of the proof. The case of *Witherspoon v. Railroad* is referred to as a controlling authority upon this point. This case has not met with the entire approval of the profession. *Telephone Company v. Carter*, 1 Tenn., C. C. A., 720.

Recurring to the instruction criticized, the Court is of the opinion that, standing alone, it was error, but that when taken into consideration in connection with that which followed, no reversible error was committed. We do not believe His Honor was under the necessity of using the term "compensation." That is an expression used in the law, but need not be given to the jury *haec verba*. His Honor told the jury that in estimating damages they should take into consideration the mental and physical suffering of the child, and also the pecuniary value of the life of the child, considering her age, expectancy, etc. We are of opinion that there was submitted to the jury these two elements of recovery, and that they were told to award such damages as in their judgment plaintiff was justly entitled to recover. It may be said that the latter expressions were too latitudinous, but we are of the opinion that the jurors considered themselves instructed to estimate the damages upon these two features from the proof, for the reason that they were directed to take into consideration matters which appeared in the proof as a matter of course. When this instruction is considered as a whole, we do not believe there was any misdirection. But if the error was affirmative as contended for by plaintiffs in error, we are of opinion that the case should not be reversed, for the reason that it did not affect the merits or the result. The

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recovery in this case was for one thousand dollars. If entitled to anything we think defendant in error may lay claim to this amount.

After due consideration of all points urged we feel constrained to overrule all the assignments of error. The judgment of the lower Court is affirmed with costs.

BARNEY & HINDS v. R. T. RONALDSON AND WIFE.

Writ of certiorari denied by the Supreme Court.

(*Jackson*. April Term, 1914.)

1. HUSBAND AND WIFE. *Gifts to wife. Purchase by wife from husband.*

A husband who was indebted to insolvency bought an automobile and gave it to his wife. Subsequently his wife and he pledged the automobile to secure certain indebtedness of the husband. Thereafter the wife repurchased the machine with money given her at different times by her father and deposited from time to time in bank to her credit. *Held*, That the wife could hold the automobile against the claims of the general creditors of the husband.

2. SAME. *Purchase of personal property with funds of wife.*

Personal property bought by the wife with money deposited to her credit from time to time by her father and never reduced to possession by the husband partakes sufficiently of a separate estate to be free from attachment or levy for the debts of her husband.

FROM SHELBY COUNTY.

Appealed from the Chancery Court of Shelby County,
Part 1. F. H. HEISKELL, Chancellor.

Barney & Hinds v. Ronaldson.

W. T. McLAIN for Complainants.

RIDDICK & RIDDICK for Defendants.

MR. JUSTICE HALL delivered the opinion of the Court.

ON March 11, 1911, R. T. Ronaldson purchased and gave to his wife, Margaret C. Ronaldson, an electric "Baker" automobile. The evidence shows that at the time of this gift to his wife, R. T. Ronaldson was largely indebted to complainants and other creditors. In fact, the evidence fairly shows that he was indebted to the extent of insolvency.

On August 1, 1911, Ronaldson being indebted to the Discount Bank & Trust Company, a banking corporation in the city of Memphis, of which he was cashier and manager, growing out of certain defalcations of his, in the sum of about \$4,200, he and his wife pledged said automobile to the bank to secure a portion of said indebtedness, the automobile being delivered over to the bank by them.

A power of attorney was executed by the bank to Ronaldson, authorizing him to sell the automobile for \$1,000, and one rectifier, which had also been pledged to the bank by said Ronaldson and wife, for \$100. The proceeds of said property, when sold, were to be paid to the bank, and applied to the satisfaction of Ronaldson's indebtedness.

On or about August 18, 1911, Ronaldson did sell said automobile to Mrs. Smith Murphy for \$1,100, and upon the payment of the purchase money, the automobile was delivered to her. Subsequently, Mrs. Ronaldson, wife of the defendant, R. T. Ronaldson, purchased or redeemed the automobile from Mrs. Murphy at the price of \$1,100. The money paid by Mrs. Ronaldson for said automobile was money that had been given her by her father, who lived in Mississippi, and was deposited by him in a bank at Yazoo City, Mississippi, to the credit of his daughter, who

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subsequently drew a draft on the Mississippi bank in favor of the Bank of Commerce at Memphis for \$3,000 of said deposits, in which bank \$3,000 was placed to the credit of Mrs. Ronaldson. It was out of this \$3,000 that Mrs. Ronaldson paid Mrs. Murphy \$1,100 for the automobile by check drawn in favor of her attorney, Mr. Manogue, who subsequently indorsed it to Mrs. Murphy. All of said checks appear in the record as exhibits to Mrs. Ronaldson's deposition. The automobile was delivered to Mrs. Ronaldson by Mrs. Murphy.

The bill in this case was filed by the complainants, Barney & Hines, on October 18, 1911, seeking a decree against the defendant, R. T. Ronaldson, for the amount of their debt, which was alleged to be \$2,332.70, and seeking to subject said automobile to its satisfaction, the bill alleging that the gift of the automobile to Mrs. Ronaldson by her husband was a voluntary one, and was made at a time when he was largely indebted to complainants and other creditors, and was, in fact, insolvent, and that said transaction was, therefore, fraudulent, both in law and in fact, and was made for the purpose of hindering and delaying complainants and other creditors in the collection of their just debts.

The bill prayed for an attachment, which was duly issued and levied upon said automobile.

The defendants answered, denying the material allegations of the bill, and especially the allegations with respect of fraud, Mrs. Ronaldson claiming that said automobile was her separate estate, having been purchased with her separate means, and was not, therefore, subject to the claims of her husband's creditors.

Upon a hearing the Chancellor dismissed so much of the bill as sought a sale of the automobile, holding that the automobile having been purchased or redeemed by Mrs. Ronaldson, after its sale by the Discount Bank & Trust

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Company, with money given to her by her father, and which was on deposit in bank to her credit, she was entitled to hold said automobile as her property free from the claims of creditors. He sustained so much of the bill as sought a decree against the defendant, R. T. Ronaldson, for the indebtedness alleged to be due complainants, but the amount of said indebtedness being uncertain and not definitely shown by the proof, that branch of the cause was referred to the Clerk and Master to report from the proof on file and any other proof that might be introduced by the parties, the true amount of indebtedness due complainants.

From so much of the decree as adjudged that Mrs. Ronaldson was the owner of the automobile and denied the complainants a sale thereof for the satisfaction of the indebtedness owing to them by the defendant, R. T. Ronaldson, they have appealed to this Court, and have assigned errors.

We are of opinion that there was no error in the decree of the Chancellor. The undisputed proof is, that the automobile was pledged by Ronaldson and wife to the Discount Bank & Trust Company to secure an indebtedness which Ronaldson owed the bank; that the automobile was sold by Ronaldson, as the agent of the bank, to Mrs. Murphy, and the proceeds of said sale was applied to the bank debt. Mrs. Ronaldson purchased or redeemed the automobile, after it had been sold to satisfy the bank debt, with funds given to her by her father and deposited to her credit in bank, and which funds had never been reduced to possession by her husband.

Money in bank to the wife's credit is a chose in action, and does not become the property of the husband unless he reduces it to his possession, which he may do at will, but if he does not elect to do so, it remains her property, and

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no creditor of the husband can compel him to reduce it to his possession.

The first proposition—that is, that a bank deposit in the name of the wife is a chose in action, is sustained by *Akin v. Jones*, 93 Tenn., 353; *Sayles v. Cox*, 95 Tenn., 578; *Grisson v. Bank*, 87 Tenn., 350; *Klepper v. Cox*, 97 Tenn., 533; *Peas v. Bank*, 114 Tenn., 693; *Williford, Adm'r., v. Phelan*, 120 Tenn., 589.

The second proposition—that is, that in order for the wife's choses in action to become the property of her husband and subject to his debts, they must be reduced by him to possession, is sustained by *Smith v. Smith*, 98 Tenn., 102; *Prewitt v. Bunch*, 101 Tenn., 723; *Scobey v. Waters*, 10 Lea, 552; *Taylor v. Bountree*, 15 Lea, 725; *Cox v. Scott*, 9 Bax., 305; *McCampbell*, 2 Lea, 661; *Lane v. Farmer*, 11 Lea, 568; *Rice v. McReynolds*, 8 Lea, 37.

From these authorities, and others that might be cited, it is clear that the money with which Mrs. Ronaldson purchased or redeemed the automobile, after it had been sold to satisfy the debt due the Discount Bank & Trust Company, was her general estate, and was not subject to the claims of her husband's creditors, and not being subject to the claims of her husband's creditors, it cannot be said that the automobile purchased or redeemed by the wife with a portion of said fund could be subjected to the debt of complainants.

We, therefore, think that Mrs. Ronaldson was as much entitled to hold the automobile free from the claims of her husband's creditors as she was entitled to hold the money in bank to her credit free from her husband's creditors.

It is insisted, however, that no such defense was made in the pleadings, and, therefore, Mrs. Ronaldson cannot rely upon such defense to defeat the claim of complainants.

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We cannot assent to this contention. We think the pleadings are sufficiently broad to entitle Mrs. Ronaldson to this relief.

The decree is affirmed. Complainants will be taxed with the costs of this appeal, and the cause will be remanded to the Court below to be further proceeded with.

GEORGE R. JAMES V. LAKE SHORE & M. S. RAILWAY
COMPANY.

Writ of certiorari denied by the Supreme Court.

(*Jackson*. April Term, 1914.)

CARRIERS OF FREIGHT. Bill of lading. Stipulation as to time of suit.

A stipulation in a bill of lading to the effect that any and all suits growing out of loss or of injury to the shipment must be brought within six months after loss or injury, if fairly and knowingly made, is binding upon the shipper; and a suit instituted after the expiration of said six months should be dismissed upon motion for peremptory instructions.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Division No. 2. J. P. YOUNG, Judge.

James v. Railway Co.

CARUTHERS EWING for Plaintiff in Error.

WRIGHT, MILES, WABING & WALKER for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS action was brought in the Court below by the defendant in error, George R. James, to recover of the railroad company damages for injuries to a valuable race horse which was being transported from Libertyville, Illinois, to Detroit, Michigan, with a number of other horses, through its alleged negligence.

There was a judgment in the Court below, where the case was tried before the Circuit Judge without the intervention of a jury, in favor of the railway company. From this judgment the plaintiff has appealed to this Court, and assigns errors.

The horse in question was being transported under a limited liability contract entered into by Ed Geers, the agent of the plaintiff, who had the horse in charge. By section ten of said contract, it was provided that all the stipulations and conditions should inure to the benefit of and extend to each and every carrier, railroad company, express company, forwarder, firm, corporation, or person to whom the express company might entrust or deliver said animals for transportation, and should define and limit the responsibility therefor of any such connecting carrier for the acts of its agents or employees.

The horse in question was being transported by the railroad company under this contract by some arrangement with the express company. It appears from a stipulation of counsel filed in the record that the horse was being transported in a car over the defendant's road from

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Libertyville to Detroit, when, on July 8, 1906, about one mile west of Stryker, Ohio, the defendant's train was taking water, while running at regular speed, from an iron chute, and the appliance for scooping up the water caught in the track, causing the car to "buckle," throwing the horse down, cutting his head, and otherwise injuring him.

Evidence was offered tending to show that the horse, prior to his injuries, was worth about \$4,000, and after his injuries, was practically worthless, and was finally sold by his owner for \$125. The damages laid in the declaration were \$2,500.

Suit was originally instituted by the plaintiff in error in the Circuit Court of Shelby County, on October 12, 1906, or about three months after the accident, to recover damages for the injuries to said horse. This suit was begun by an original attachment on one of the defendant's cars found in Shelby County, Tennessee, the defendant being a non-resident corporation and having no office or agent in Tennessee.

The defendant railroad company filed a plea in abatement in this action to the jurisdiction of the Court, which was sustained and the case dismissed without trial on the merits; thereafter, on April 4, 1910, the Supreme Court of the United States, in *Davis v. Railroad*, 217 U. S., 157, held that jurisdiction could be acquired in this way—that is, by attachment of one of the defendant's cars, though such car, at the time, was being used for interstate commerce purposes. Thereafter, on May 28, 1912, the present action was instituted by the plaintiff in error against the railway company under an agreement that defendant would accept service and enter its personal appearance in the Court below, which was done.

By section 10 of the contract with the express company it was agreed that all the stipulations and conditions set

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forth in said contract should inure to the benefit of and extend to each and every carrier, railroad company, express company, forwarder, firm, corporation, or person to whom the express company might entrust or deliver said animals for transportation, and should define and limit the responsibility and liability therefor of any such connecting carrier for the acts of its agents or employees.

By section 11 it was provided: "The shipper agrees that in no event shall the express company be liable for any loss or damage unless the shipper shall, within thirty days after such loss or damage accrues, give notice in writing of his claim therefor to the express company, and that any suit against the express company for the recovery of loss of or damage to the property herein specified shall be commenced within six months next after such loss or damage shall have accrued, or be forever barred, and should any suit be commenced against the express company after the expiration of the said six months, the lapse of time shall be taken as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding, and there shall be no waiver of the aforesaid time within which said claim shall be made, or within which suit shall be commenced, unless the express company expressly agrees in writing to waive the same, and the shipper hereby so expressly stipulates and agrees."

By one of its pleas, the defendant railroad company plead the six months' limitation, or the failure of the plaintiff in error to bring his suit within six months after the injuries to the horse in question were inflicted, or the accrual of his cause of action, as a complete bar to the present suit.

The plaintiff in error demurred to this plea of the railway company on the ground that the present action was not a suit against the express company, and, therefore, was

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not controlled by the contract provision above set out, but was a suit against the railway company who actually transported the stock. This demurrer was overruled, and, thereupon, the plaintiff in error joined issue on said plea.

Upon the trial in the Court below the contract of shipment was introduced in evidence, and showed that it was executed in July, 1906. As before stated, the present action was not commenced against the railroad company until May 28, 1912, or nearly six years after the right of action accrued.

We think the provision of the contract that suit should be brought within six months after the plaintiff's right of action accrued, was a reasonable and valid stipulation, and the shipper was bound by it. This precise question was before the Supreme Court of the United States in the case of *Railway Company v. Harriman*, 227 U. S., 657, 671, and that Court held such a stipulation valid. Our own Supreme Court has held in a number of cases that a stipulation requiring the shipper to file his claim for loss or damage within a limited time, as a condition precedent to any right of recovery, is valid and binding on the shipper. *Brownsville Livery Co. v. Railroad*, 123 Tenn., 298; *Railroad v. Wade*, 1 App. Cas., 780, and the authorities there cited.

We are aware of no statute in this State declaring invalid contracts which require the bringing of an action for a carrier's liability in less than the statutory period, and we are of opinion that there is no obstacle in the way of the carrier making such a contract with a shipper, provided, the contract is fairly made, and no fraud is practiced. In other words, we think this may properly be made a matter of contract between the parties.

By section 10 of the contract it is provided that "all the stipulations and conditions in this contract shall inure to

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the benefit of and extend to each and every carrier, railroad company, express company, forwarder, firm, corporation, or person to whom the express company may entrust or deliver said animals for transportation, and shall define and limit the responsibility and liability therefor of any such connecting carrier for the acts of its agents or employees."

It results, therefore, that we are of opinion that the stipulation in the contract under consideration was binding on the plaintiff in error, and that he was bound to bring his action within the period provided in the contract. The fact that he did institute an action in the Circuit Court of Shelby County, by original attachment, within the six months, which action was abated on the plea of the railway company, is no answer to the insistence that the present action, which was brought nearly six years afterwards, is barred. The judgment of the State Court in the former action was binding on the plaintiff, he having failed by proper action to carry the case to the Supreme Court of the United States, which he might have done on account of the Federal question involved, and secured a reversal of the judgment of the State Court. A reversal of said judgment would, in all probability, have been the result, if said case had been carried to the Supreme Court of the United States. We say this in view of the subsequent holding of that Court in *Davis v. Railroad*, 217 U. S., 157, in which case a similar question was involved. However, the plaintiff's acquiescence rendered the judgment in the State Court a finality.

In view of the conclusion reached, we deem it unnecessary to consider the other questions presented in the case. The judgment is affirmed with costs.

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SOUTHERN RAILROAD COMPANY v. HERMAN CROHM.

Writ of certiorari denied by the Supreme Court.

(Jackson. April Term, 1914.)

1. BILL OF EXCEPTIONS. *Duty of appellant to see that all evidence included.*

It is the duty of the party appealing from the judgment of a Circuit Court to see that the bill of exceptions presented by him contains all the evidence submitted to the jury at the time of trial. If the bill discloses the fact that material evidence heard in the lower Court upon a controverted issue is not included, the judgment must be affirmed.

2. CARRIERS OF FREIGHT. *Delayed shipments. Measure of damages.*

A merchant who at the beginning of a season orders a quantity of goods to be placed in stock and sold during the season may recover the difference in value between the goods if delivered in a reasonable time and their value at the time of their delayed delivery if this delivery was unreasonable, and in estimating the difference in value he will be permitted to show that the goods were more valuable by fifty per cent at the beginning of the season than they were during the latter part of the season.

3. SAME. *Knowledge of carrier of conditions.*

A common carrier is chargeable with knowledge that a dealer in merchandise who orders a shipment of goods to be placed in stock intends to resell them in a reasonable time, and the carrier may be held liable for losses that are reasonably calculated to follow from the delivery at a late date in the season.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Division No. 4. H. W. McARTHUR, Judge.

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KING & KING for Plaintiff in Error.

BELL, TERRY & BELL for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

DEFENDANT IN ERROR recovered a verdict and judgment of \$84.00 against plaintiff in error as damages for an alleged delay in a shipment of trunks from Milwaukee. Motion for a new trial was entered and overruled and judgment pronounced. To reverse the judgment the present appeal in error is prosecuted.

Preliminarily to a discussion of the substantive questions of law we must dispose of some matters of procedure. A motion has been made by defendant in error to affirm the judgment for the reason that the bill of exceptions discloses the fact that a part of the evidence submitted to the jury is not included therein. This motion is resisted by plaintiff in error, and is met by the counter-contention that, while a material part of the evidence is out of the record, if it is essential, the omitted matters should be brought to the attention of this Court upon suggestion of diminution. It is also contended that upon the case as now presented there is no material evidence to support the verdict, in that there is no evidence of delivery to the carrier and of negligent delay or detention of the goods. During the argument of this case, acting upon intimation from members of the Court, counsel for plaintiff in error suggested diminution of the record in respect to the absence of bill of lading, freight bill, shipper's receipt and invoice. Upon return to the writ the documents were brought in or treated as in. The documents mentioned were not copied in the original bill of exceptions nor even called for by it, nor were they identified or authenticated by the trial Judge so as properly to be

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considered, and yet it is apparent from numerous recitals in the bill that some documents of this nature were submitted to the Court and the jury and read and considered by them.

If we were to apply to plaintiff in error the rigid rules of law, we would be constrained to affirm the judgment because all the evidence is not before us. It is the duty of an appellant to see that all the material evidence is included in the bill of exceptions. If he expects a reversal upon the ground that the evidence does not support the verdict, it is his duty to see that all matters of testimony referred to in the bill of exceptions are included. In case of failure so to do the rules of practice imperatively demand an affirmance: *Nolen v. Wilson*, 5 Sneed, 340; *Battier v. State*, 6 Cates, 563; 2 Elliott's Gen. Prac., Sec. 1059. It is the duty of the appellant to see that the bill of exceptions does contain all the evidence. In the first case cited quite a similar state of facts to that found here was presented. It was held that an affirmance must be had when the bill of exceptions reveals the fact that documentary evidence considered by the jury was not included therein. If the bill of exceptions contains the statement that it embraces all the evidence and there be nothing to indicate otherwise, the verdict must be tested by what is found therein. But notwithstanding the statement that it contains all the evidence, as does the bill of exceptions here, if it is apparent that this statement is untrue, the rules of practice require an affirmance.

But we have nevertheless treated the documents as in the record for the purpose of disposing of assignment of error No. 3, to the effect that there is no evidence to support the verdict; and shall not, therefore, act upon the motion of defendant in error to affirm. Under this assignment it is said that there is no evidence to support the verdict

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for the reason that there is nothing to show the delivery of the goods to the carrier or the length of time they were detained by it. Treating the documents as in the record, all these facts are clearly shown. It is apparent from them and from admissions found in the bill of exceptions and in the testimony of plaintiff's agents that the goods were received in Memphis about the 27th of October and were not delivered to defendant in error until about the 16th of December. This is evidence of delivery to the carrier and of negligence.

The first and second assignments can be disposed of by us most conveniently by conjoint treatment. A short recital of the facts and history of the litigation is appropriate as a preliminary to their consideration.

Defendant in error is a merchant in the city of Memphis. He deals in jewelry, handbags, trunks and other merchandise. In September, 1910, he gave a Milwaukee house an order for \$210 worth of trunks to be resold on the Memphis market. The goods were consigned to him somewhere about the 15th of October and reached Memphis on the 27th. For reasons held insufficient as an excuse, delivery of the shipment was not made to Crohm until the 16th of December. The bill of lading issued was in the customary form and there was nothing in the circumstances and nothing said at the time which put the carrier upon notice that the goods were to be resold in any special market; and it is urged by the railway company that no substantial damages should be awarded, for the reason that they necessarily would be for loss of profits and, therefore, speculative. It was further contended by the railway company that the effort of Crohm was to recover damages for losses sustained by failure to reach a special market or a special season of which it had no knowledge. The errors assigned are to the effect that

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the Court permitted him to recover special damages or damages beyond mere market value, and that the Court permitted him to prove the circumstances of this special season and special market.

It is true as urged by learned counsel that speculative damages or loss of profits cannot be recovered against a carrier unless the special circumstances be brought to its attention at the time of shipment. No authorities are needed to sustain this well-known proposition. But a carrier is always responsible in damages to the extent of the difference in market value at date of shipment and day of delivery. While the evidence in this record respecting the difference in market value between October 27th and December 16th is not very cogent, it is yet some evidence upon which the jury could predicate a finding. The witnesses stated that the difference in price or value of trunks between the dates given was from 40 to 50 per cent—that is, that trunks were worth from 40 to 50 per cent less on the market as merchandise on the 16th of December than they were on October 27th. If plaintiff in error did not believe this statement it was its duty to have controverted it by counter proof. We agree with what learned counsel say about temporary inflations of price and unusual conditions which influence price as not the proper criteria of value (12 Ohio Decisions, 74; *Bran v. R. R.*, 108 S. W., 361), but in the instant case the witnesses are emphatic in their statement that the fall in price is usual or likely. This evidence takes the question of damages from the realm of speculation. Besides, these statements are not so absurd as contended for. There are many reasons why goods are not as valuable at the termination as at the beginning. In addition, the carrier was chargeable with knowledge that these trunks were bought to be resold within a reasonable time, and that delay would materially affect

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their market value. *B. R. v. Implement Co.*, L. R. A. N. S., 1058.

The jury in the instant case awarded a verdict of \$84.00, thus estimating the difference in market value at 40 per cent. We do not feel authorized to disturb this verdict, nor to pronounce the action of the Court in sustaining it upon the market value theory erroneous. All assignments of error are overruled, and the judgment is affirmed with costs.

STATE, EX REL MAYME B. MALCOM, v. LONSDALE SCHOOL BOARD.

Writ of certiorari denied by the Supreme Court.

(*Knoxville*. September Term, 1914.)

1. PUBLIC SCHOOL. *Election of teacher by board. Power to bind successors.*

A municipal school board has the authority to elect public school teachers for a period of time extending beyond the official life of the members of the board; and the successors to such board cannot arbitrarily nullify the election made by their predecessors and proceed to elect new teachers, upon the unwarranted ground that the change was required by economic pressure.

2. ELECTIONS OF TEACHERS. *Meetings of board. Official and non-official meetings.*

The election of a teacher by such board cannot be adjudged void upon the ground that it took place at a meeting not called for that purpose if the meeting at which the election was had was an adjourned one from a meeting held for the transaction of affairs in general.

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3. SAME. Discharge of teacher for false reasons.

Such school board is without power to discharge a teacher regularly employed and qualified upon grounds of economy that are falsely alleged as the reason for the dismissal of the teacher, although it be conceded that the board had the power to discharge teachers for lack of funds.

4. SAME. Mandamus. Compensation.

A school teacher regularly elected to a position in a city school and standing ready and able to discharge the duties of the position may by mandamus compel the issuance of a warrant upon the city treasury for the payment of the stipulated compensation.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County. V. A. HUFFAKER, Judge.

J. R. PENLAND for Plaintiff in Error.

T. L. CARTY for Defendants in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THE relator, Mayme B. Malcom, was elected by the school board of the city of Lonsdale, Knox County, Tennessee, on May 16, 1912, to teach as principal in the public school of Lonsdale for the term of nine months, beginning September 9, 1912, at a salary of 80 per month. A written contract was signed, executed and delivered to the relator by three members of the board, and bears date of May 16, 1912. The remaining two members of the board did not sign the contract.

On September 7, 1912, just two days before the relator was to begin her term, and while said contract still sub-

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sisted and was in full force and effect, said board had an official meeting and abolished the position of principal in said school, conferring the duties of principal upon the superintendent thereof, and when the relator appeared at the school building on the morning of September 9, 1912, to begin her term of service as principal of said school, she was notified that her position had been abolished by the board and her services would not be needed.

She endeavored to secure employment as a teacher elsewhere, but her efforts were unsuccessful until January 27, 1913, when she secured employment in the city schools of Knoxville at a salary of \$60 per month, and taught four months. From this employment she earned \$240.

She filed her petition in this cause, against the Board of Education of the Lonsdale School to require them to issue to her a warrant or warrants for the salary she would have earned as a teacher in said Lonsdale school under her contract with said board, less the \$240 earned by her in the city schools of Knoxville, which amounted to \$480.

The petition alleged that the action of the board abolishing her position in said school and dismissing her from its service, after she had been duly elected by the board, and after a written contract had been entered into with her as a teacher in said school, was wrongful and without warrant of law, and was not done in good faith.

The Board of Education answered the petition, interposing three defenses—namely: (1) That the relator was elected on May 16, 1912, by the Board of Education of the city of Lonsdale, as it was then constituted, for a term extending beyond that for which said board was elected, and in so doing, said board exceeded its power and authority, and its action was not binding on its successors; and (2), that the relator was not legally elected at the official meeting of May 16, 1912, because said meet-

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ing was a special meeting held for a purpose other than that of electing teachers for said school, and, therefore, the contract entered into by the board, as it was constituted on May 16, 1912, was not binding on the present board, defendants to the petition; and (3), if the relator's election on May 16, 1912, was legal and binding on the defendant board, its action abolishing her position in said school on September 7, 1912, was valid and binding on relator, because it was done for the purpose of cutting down the expense of said school, and to enable the board to meet a deficit in the funds of said school for said term.

Upon a hearing the Circuit Judge dismissed the relator's petition, and taxed her with the costs of the cause. From the judgment of dismissal she has appealed to this Court, and has assigned the action of the Court below for error.

By the assignment it is insisted:

(1) There is no evidence to support the judgment; and (2), that the Court committed error in holding that the school board of Lonsdale, as constituted on May 16, 1912, did not have authority to elect teachers for said school for the ensuing year 1912-13, including petitioner; and (3), that the Court was in error in refusing to hold that petitioner was duly and legally elected to the position of principal in said school on May 16, 1912, as evidenced by her written contract signed by a majority of said board; and (4), that the Court committed error in not holding that said school board, as constituted on September 7, 1912, was without authority to ignore her contract with the old board, and to abolish her position in said school under said contract, thereby depriving her of the right to teach in said school; and (5), that the Court committed error in not allowing petitioner a recovery for the amount alleged to be due her, and in taxing her with the costs of the cause.

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The city of Lonsdale is a municipal corporation, having been chartered by chapter 305 of the Acts of the General Assembly of 1907. The school of Lonsdale was established under chapter 19, Act of 1885, which provides that the several incorporated cities and towns within this State may, through their boards of mayor and aldermen, establish and maintain within their respective corporate limits, a system of high graded common schools. Said Act also provides that such cities or towns may levy and collect an additional tax to that imposed by or under the general provisions of the school law upon taxable polls, privileges, and property within the corporate limits of such city or town, in no event to exceed the rate of taxation for general purposes fixed by charter limitation, for the purpose of erecting, causing to be erected, or purchasing, such school buildings or houses, and furnishing the same, and for the purpose of establishing and maintaining such high graded common public schools.

It is further provided by said Act that the board of mayor and aldermen of any such municipal corporation so establishing public schools of the character in said Act provided, shall have full power to appoint a board of education, consisting of not exceeding six qualified citizens residing within the corporate limits of such city or town, which board, when so appointed, shall have full power as trustees or directors to manage and control such school, to elect or employ teachers, and to prescribe all needful rules and regulations; and said board shall hold its office as follows: Two for three years, two for two years, two for one year, and after the first year two commissioners shall be elected each year, subject to removal for good cause by the said board of mayor and aldermen.

At the time of the election of the relator as a teacher in the Lonsdale school the board consisted of five members,

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to-wit: J. E. Baker, chairman; W. B. Ailor, O. E. Householder, W. C. Johnson and J. F. Johnson, associate members. The term of all of said members extended beyond the term for which the relator was elected as a teacher in said school, except the term of W. B. Ailor, which expired the latter part of May, 1912.

It appears that the board met at the office of the school building in Lonsdale on the night of May 14, 1912, the usual time, for the purpose of electing teachers for said school for the ensuing year. At this meeting all teachers were elected to fill the various positions in said school, except the position of principal, which was not filled at this meeting. The evidence is in dispute as to whether or not a vote was taken on the election of a teacher to the position of principal; some of the members of the board say that the relator, who was an applicant for said position, was voted on, and the majority of the members cast their votes against her. Other members of the board say that no vote was taken, but it was decided to defer the election of a principal for said school until later. However, we think it is immaterial whether the board undertook to elect a principal for the school at that meeting or not. All of the members of the board agree that no election was made at that meeting for this position. The undisputed proof shows that the board adjourned its meeting of May 14, 1912, to the night of May 16, 1912, a period of two days. It is a controverted question of fact as to whether this adjourned meeting was for the purpose of signing up the contracts of the teachers who had already been elected, or whether it was for the additional purpose of electing a principal for said school. However, we think this is likewise immaterial. It does appear that all of the members of the board met at the office of the school building on the night of May 16th, pursuant to the

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adjournment taken on the night of May 14th, and entered into the election of a principal teacher for said school, when the relator was elected by a majority vote of three to two—the two Johnsons voting for another applicant. It is not only undisputed that all of the members of the board were present at that meeting, but it is undisputed that all of them participated in said election; they all agree that the relator was elected at said meeting, and a contract was subsequently drawn up and signed by the relator and three members of the board, authorizing the relator to teach said school for the ensuing term, and in accordance with her election, for a stipulated salary of \$80 per month. The two Johnsons, who, the record shows, were very much opposed to the relator's election, refused to sign said contract, because they say that they did not believe that she was legally elected.

It appears that the contract executed by the majority of the board was delivered to the relator, and she held this contract at the time her position was abolished on September 7, 1913.

It appears that on June 6, 1913, after the election of the relator, L. B. Lewis was elected by the board of mayor and aldermen of Lonsdale to succeed the member, W. B. Ailor, whose term had expired; and it was by the vote of the two Johnsons and Lewis that the relator's position was attempted to be abolished at the meeting of September 7, 1913, which was just two days before her term was to begin, as before stated.

We are of opinion that there is no merit in the contention that the board was without authority to elect a teacher for said school for a term extending beyond that of the member Ailor. Where there is no limit placed on the exercise of the power conferred upon school trustees or boards to contract with and employ teachers, a contract by

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such trustees or board employing a teacher for a term to commence or to continue after the expiration of the term of such trustee or board is valid and binding upon their successors in office, and especially is this true where the trustees or board act in good faith. *Caldwell v. School District No. 1*, 55 Fed., 372; *Tappan v. School District No. 1*, 44 Mich., 500; *Cleveland v. Amy*, 88 Mich., 374; *Farrell v. School District*, 98 Mich., 43; *Gillis v. Space*, 63 Barb., 177; *Wait v. Ray*, 67 N. Y., 36; *Reubelt v. Noblesville*, 10 Ind., 478; *Taylor v. School District*, 16 Wash., 365; *Wilson v. School District*, 36 Conn., 280; *Gates v. School District*, 53 Ark., 468; 35 Cyc., 1079; 25 Am. & Eng. Ency. of Law (2d Ed.), 14.

There is no evidence tending to show that the board, as it was constituted on May 16, 1912, did not act in good faith. The mere fact that the term of one of its members expired on May 24th or 27th, did not render its action void.

It is next insisted that the board had no right to elect a teacher to fill the position of principal at the meeting of May 16th, because the minutes of the meeting of May 14th show that the meeting was adjourned over to May 16th for the purpose of signing the contracts of the teachers who had been elected at the previous meeting only.

As before stated, the evidence shows a sharp conflict as to the purpose of the adjourned meeting. The two Johnsons say that the meeting was adjourned over to the 16th for the special purpose of signing the contracts of the teachers who had been elected at the previous meeting. The other three members of the board, as well as Mr. Broiles, superintendent of the school, and who was present at the meeting of May 4th, say that the meeting was adjourned over for the additional purpose of electing a

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teacher to fill the position of principal in said school. There is no provision in the statute authorizing the election of said board, nor is there any general statute prescribing any regulations whatever by which said board shall be governed in the election of teachers for said school. The board had no regular dates for its meetings. The statute authorizes the board itself to prescribe rules and regulations for its action in all matters pertaining to the school. The board in question had never prescribed any rules or regulations for its government. All of its meetings were held upon the call of the chairman. The meeting of May 14th was called by the chairman for the purpose of electing teachers. All the members were present at that meeting. At that meeting the board adjourned, after electing the primary teachers, until the 16th. At this adjourned meeting all the members were present. The election of a principal for said school was taken up; all the members participated in the election, and all agree that the relator was elected at that meeting.

We are, therefore, of opinion that it is immaterial for what purpose the meeting of May the 14th was adjourned. All the members of the board being present, and the board acting as an official body, had the right to go into the election of a teacher for the position of principal, and the election was valid and binding, and the same would be true of any other business transacted at that meeting not prohibited by statute or some fixed rule of the board.

It is next insisted that the board, as constituted on September 7, 1913, had the authority to abolish the position of principal in said school, and thereby dispense with the relator's services, notwithstanding she had a valid contract with the board.

As before stated, this insistence is based on the ground that it was necessary to cut down the expenses of the

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schools in order to enable to school to meet its obligations.

We are of opinion that this contention is absolutely without foundation. The undisputed evidence is, that at the same meeting in which the relator's position was abolished, the board elected two more teachers, one at a salary of \$50 per month, and the other at a salary of \$45 per month. At a previous meeting the salaries of three of the other teachers were raised \$5 per month, making a total of \$15 per month, or a total of \$135 for the term. At a previous meeting the salary of the janitor was increased. The proof shows that the school received more money for the year 1912 than it had received for the preceding year.

It is shown that the board was divided into factions, growing out of church relations or differences in the city of Lonsdale. The two Johnsons and Lewis belonged to one faction, and the other members of the board belonged to another faction. We think the evidence tends strongly to show that this factional spirit existing in the board ultimately led to the abolition of the relator's position in the school. We are not seriously impressed with the claim that her position was abolished for economic reasons.

It results that the judgment will be reversed, and the cause will be remanded to the Court below with the direction that that Court issue a peremptory writ of mandamus requiring the school board to issue a proper warrant to and in favor of the relator for the full amount of her salary as teacher in said school for the term to which she was elected, less the \$240 that she earned as teacher in the city schools of Knoxville.

The school board is taxed with all the costs of the cause.

Cotton Milling Co. v. Bank.

IMPERIAL COTTON MILLING COMPANY v. CITIZENS BANK
OF OLIN, ET AL.

Writ of certiorari denied by the Supreme Court.

(*Jackson*. April Term, 1914.)

1. **SALES OF PERSONALTY.** *Negotiation of bill of lading to bank.
Rights of endorsee.*

A bank which discounts a draft drawn by the seller of personal property with bill of lading attached and credits the drawer's account with the amount and does other things to indicate an absolute purchase of the draft, becomes in effect the owner of the personal property described in the bill of lading.

2. **SAME.** *Replevin. Refusal of drawee to pay draft.*

And in such case, when the drawee of the draft refuses to pay at the request of the endorsee bank, the latter may maintain replevin to recover the personal property described in the bill of lading.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Division No. 3. A. B. PITTMAN, Judge.

S. E. MURRAY for Plaintiffs in Error.

J. GREER ROGERS for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS was a suit in replevin brought by the Citizens Savings Bank of Olin, Iowa, against W. H. Taylor, a

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deputy sheriff of Shelby County, in the Circuit Court of said county, to recover three car loads of hay which had been shipped to Memphis, Tennessee, by I. Smith, a hay dealer of Olin, Iowa. Two of the cars were shipped on June 24, 1912, from Fayette, Iowa, consigned to the order of I. Smith, with instructions to notify the Imperial Cotton Milling Company. The third car was shipped on June 28, consigned direct to the Imperial Cotton Milling Company. The hay had been sold by Smith to the Peoria Commission Company, of Peoria, Illinois, and was consigned, as above stated, in accordance with arrangements previously made with the Peoria Commission Company.

There was evidence tending to show that, at the time of the shipments, the bills of lading were transferred by Smith to the defendant in error bank, by Smith indorsing his name on the backs thereof, and that sight drafts were drawn by Smith in favor of H. W. Flenniken, cashier of the defendant in error bank, upon the Peoria Commission Company covering said shipments, which bills of lading and drafts were, by the bank, forwarded to the Peoria Commission Company for payment, and the account of Smith with said bank was credited with the amount of said drafts as so much cash, and he was permitted by the bank to check against said account.

The bill of lading for the car shipped June 28th was indorsed by H. W. Flenniken, cashier of the defendant in error bank, signing the name of Smith on the back thereof, and the evidence tends to show that he (Flenniken) had authority from Smith to so indorse said draft.

Upon the hay reaching Memphis, the plaintiff in error milling company attached the same to secure a claim which it held against Smith, the attachment being executed by W. H. Taylor, a deputy sheriff of Shelby County, on July 5, 1912, and was levied on the hay as the property of I.

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Smith. The drafts, which had been drawn on the Peoria Commission Company and forwarded to it by the bank for payment, were dishonored by the Peoria Commission Company refusing to pay them, and they were returned to the defendant in error bank, and charged by the bank to the account of Smith, whose account had previously been credited with them, as before stated. Thereupon, the bank replevied the hay from the officer, as before stated.

Upon a hearing of the case in the Court below, upon motion of the plaintiff in error milling company, its name was substituted for that of the officer as defendant, and the case was tried before the Court and a jury, and a verdict was rendered in favor of the defendant in error against the plaintiff in error milling company for the possession of said hay and costs of suit.

Its motion for a new trial having been overruled and a judgment having been rendered in accordance with the verdict of the jury, it has appealed to this Court and has assigned errors.

No contention is made that there is no evidence to support the verdict of the jury. At least, no assignment is made to that effect. The first error assigned is, that the Court erred in charging the jury as follows:

"If you find that the drafts and bills of lading introduced in this cause were turned over to the plaintiff and the amount of said drafts credited to the account of the said I. Smith, and he, the said Smith, permitted to check against said account, then I charge you that the plaintiff would have a right to recover in this suit, and this is true if the drafts were returned to the bank unpaid and charged to the account of the said Smith."

It is insisted that the Court should have instructed the jury, that before the title to said hay could pass to the bank

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by the indorsements of the bills of lading, it must appear that it was the intention of the parties that it should do so.

We find, upon an examination of the charge, that the excerpt set out in the assignment of error is not correctly quoted by counsel for the plaintiff in error. The instruction that was given by the Court is as follows:

"If you find that the drafts and bills of lading introduced in this cause were turned over to the plaintiff and the amount of said drafts credited to the account of the said I. Smith, and he, the said Smith, permitted to draw against said account, and the bank did not take the drafts for collection, but as cash items, then I charge you that the plaintiff would have a right to recover in this suit, and this is true, if the draft was returned to the bank unpaid, and charged back to the account of the said Smith. But if said drafts were deposited for collection only, then you will find for defendants."

We think the instruction of the Court, when stated in its entirety, fully meets the criticism made by counsel for the plaintiff in error.

By the second assignment it is insisted that the Court erred in charging the jury with respect of the car shipped on June 28th, which car was consigned direct to the plaintiff in error. It is insisted that the trial Judge again failed to charge that before the title to this car could pass under the indorsed bill of lading, it must be shown that it was the intention of the parties that the title should pass to the bank.

We find that counsel for the plaintiff in error fails to correctly state in his brief what the Court did charge with respect of this instruction, and when the charge of the Court is correctly stated, it meets the criticism made by counsel. The Court's instruction was as follows:

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"If you find that one of the cars of hay was consigned to the company at Memphis and that the draft for said hay and the bills of lading for said car attached to said draft, which was introduced in this cause was turned over to the plaintiff and the account of the said Smith credited with the amount of said draft and he, the said Smith, permitted to draw against said account, then, and in that event, plaintiff has a right to recover in this action, and this is true, if the draft was afterwards returned unpaid and charged to the account of the said Smith.

"If you find that one of the cars of hay was consigned to the company at Memphis, then the title to that would be in the company. But if the shipper showed an intention to retain title to it as by attaching a draft for the purchase price to the bill of lading, and transferred same to bank and the bank credited the shippers' account with the amount of the draft, as cash item and not for collection, and the shipper permitted to draw against said account, then the title to it would be in the bank, and this is true, if the draft was afterwards returned unpaid, and charged back against the account of the shipper."

It is next insisted that the Court committed error in permitting the plaintiff below to introduce in evidence over the objection of the defendant milling company, a certain exhibit, "A," to the deposition of the witness, H. W. Flenniken, containing the account of I. Smith with the bank. It is insisted that said exhibit is incompetent because not the original entries, and is not, therefore, the best evidence.

We are of opinion that there is no merit in this assignment of error. It is shown that said exhibit is a leaf of the original ledger upon which the account of I. Smith was kept, and contains the original entries. We do not think the bank was bound to file the entire ledger in order to

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make the exhibit competent. We think, under the circumstances, that a true copy of the original entries would have been sufficient; but the bank filed the leaf of the ledger containing the original entries. No contention was made by the plaintiff in error that these entries were not correct.

It is argued in brief of counsel that the bills of lading with sight drafts attached were turned over to the bank by Smith for collection only, and that there was no intention upon the part of either the bank or Smith that the title of the hay should pass to the bank under the indorsed bills of lading.

The Court left this question to the jury for determination under proper instructions, and, as before stated, no assignment of error is made insisting that there was no evidence to support the verdict of the jury, which was adverse to the insistence of the plaintiff in error. The bills of lading having been indorsed to the bank by Smith, a special property in the hay embraced in the bills of lading passed to the bank, subject to be divested out of it by the acceptance and payment of the drafts by the drawee, Peoria Commission Company, and on the drawee's refusal to accept and pay the drafts, the title of the bank, who held the drafts by virtue of said indorsement, became absolute, and it had the right to maintain its action of replevin against the plaintiff in error for the recovery of the hay.

The judgment is affirmed with costs.

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MARY HARRIS BARROW v. EUGENE BARROW, ET ALS.

Writ of certiorari denied by the Supreme Court.

(Nashville. December Term, 1913.)

1. JUDGMENTS AND DECREES. *Non-residents. Insurance companies. Personal service.*

A judgment or decree rendered against an insurance company after service of process upon the commissioner of insurance, who had power of attorney to accept service for the insurance company sued cannot be classed as a judgment or decree against a non-resident without personal service of process. Such judgment or decree must be treated as binding upon the insurance company to the same extent as if rendered against a resident after service of process.

2. SAME. *Non-resident defendant.*

A local defendant to a suit or a defendant who is on the same footing as a local defendant cannot assail as void a decree rendered against a non-resident defendant and himself upon the ground that the decree against the non-resident defendant was of a personal nature and rendered without service of process. This defense or attack must be made by the non-resident himself.

3. SAME. *Validity of decree against a non-resident without personal service. Quasi-action in rem.*

A decree rendered in favor of a resident complainant against a non-resident without personal service of process cannot be adjudged void where the relief sought partook of the nature of an action *in rem* such as suit by a pledgee or lien holder against a chose in action in the possession of the resident complainant.

4. CHANCERY PLEADING AND PRACTICE.

A Court of Equity will entertain a bill filed for the purpose of preserving and perpetuating rights of an equitable nature

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which might be lost or embarrassed by future events which are probable and which cannot be alleviated or obviated by action at law.

5. DECREE ON PRO CONFESSO. *Review.*

A decree pronounced on *pro confesso* may be reviewed upon appeal or writ of error.

FROM MAURY COUNTY.

Writ of error to the Chancery Court of Maury County.
W. S. BEARDEN, Chancellor.

HOLDING & GARNER for Petitioner.

W. J. WEBSTER for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS is an application of error to review a decree pronounced by the Chancery Court of Maury County upon *pro confesso* in a proceeding under the above style. The questions presented for determination are somewhat novel, but we are of opinion that they can be disposed of upon well-known equitable and legal principles. This application is made by the Union Central Life Insurance Company alone, the decree in the lower Court as against its co-defendant E. J. Barrow remaining undisturbed except as it is affected, if at all, by this proceeding in review.

The principal ground upon which the decree of the Chancellor is assailed is that it was and is of a personal nature against non-residents; and being taken without personal service of process, is absolutely void. In order to

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appreciate the question it is requisite that there be a short statement of the pleadings, proof and the decree.

Complainant is the widow, distributee and administratrix of one John D. Barrow, who died in Maury County sometime during the year 1910. She preferred her bill against one Eugene J. Barrow and the defendant insurance company for the twofold purpose of having an accounting of the indebtedness due from Eugene Barrow to the estate of her husband and herself, and to have this indebtedness adjudged to be a lien or charge upon a certain life insurance policy for \$5,000 issued by the defendant company on the 28th day of October, 1897. She averred in her bill that Eugene Barrow had paid four or five installments or premiums and that he had thereafter induced her husband and intestate to pay others; that Eugene Barrow became indebted to John D. Barrow for and upon other accounts; that in particular said Eugene Barrow had transferred and assigned this policy to the defendant insurance company to secure some large sums which were afterwards paid by John D. Barrow for and at the request of Eugene Barrow; and that during the year 1909, John D. Barrow took an assignment of this policy to indemnify him for all sums which he had paid to the company for Eugene Barrow, whether in discharge of premiums or for other indebtedness, and to secure other advances and indebtedness held against said Eugene Barrow, and to secure him, the said John D. Barrow, for and upon all future advances or indebtedness incurred for or in behalf of Eugene. It was alleged that this transfer or assignment had been communicated to and accepted or acquiesced in by the insurance company. The formal assignment of the policy was filed as an exhibit to the bill. Its provisions will be adverted to later on.

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It was alleged that the amount of indebtedness due from Eugene Barrow, thus secured, was indefinite, uncertain, and in various sums and extended over quite a length of time; that complainant had made efforts to locate said Eugene Barrow with the view of having an ascertainment of the status of these obligations, but that she had failed; that many of the obligations secured by the policy were getting old and would be barred by the statute of limitations if there was delay until maturity of the policy; and, while not expressly so stated, it is inferable from the wording and scope of the bill that complainant feared to await the course of events and reliance upon legal rights, and therefore desired the intervention of a Court of Equity for the purpose of having her rights declared. The specific object of the bill was to have an adjudication of the amount of the indebtedness of Eugene Barrow to the estate of her husband and herself, and to have it adjudged a lien upon the policy of insurance, which she had in her possession and in the jurisdiction of the Court, and to notify the insurance company of the extent and nature of her rights and her claim as assignee or lienor upon the policy or its proceeds. She also desired an adjudication of her relations and rights with respect to those premiums which she had paid and which she expected to pay.

Eugene Barrow was proceeded against by publication. Service of process, issued against the insurance company, was had upon the insurance commissioner of the State in the manner prescribed by section 3295, Shannon's Code, it being recited in the decree *pro confesso* that the insurance company was doing business within the State. As just stated, judgment *pro confesso* was taken against both defendants.

On the 30th day of April, 1913, this *pro confesso* order was entered. Subsequently and as prescribed by statute

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governing notice, complainant's deposition was taken. There were likewise filed in the proceeding numerous exhibits, consisting of the assignment of the policy, some obligations and notes, and much correspondence between and among complainant and husband and Eugene Barrow and the agents of the insurance company and others. In May, 1913, the cause was regularly heard. The Chancellor decided that Eugene Barrow was indebted to complainant personally and as administratrix of her husband to the extent of some \$3,100, and that this indebtedness was secured by and was a lien upon the policy of insurance described in the pleadings. The Chancellor further decided that complainant as the assignee of this policy had rights to be preserved and fixed, and these were adjudged accordingly. The Chancellor further expressly decreed that the policy had been regularly assigned with the consent of the company, and that the company should be adjudged cognizant of the rights of complainant and the extent thereof as assignee, holder and lienor, and that this company should be judicially informed, as a protection against future contingencies, of the nature and extent of those rights and of its future obligation to complainant.

We are of opinion that learned counsel cannot insist for and on behalf of Eugene Barrow, an uncomplaining co-defendant, that the decree against him is void for lack of service of process. Barrow is not assailing it.

With respect to the contention of the insurance company that the decree is void as to it for the same reason, it needs but to be said that the company stands on quite a different footing from that of a non-resident individual. As we understand, the laws regulating the admission of foreign insurance companies into this State, prescribe as a condition precedent or as an essential prerequisite the lodgment with the insurance commissioner of a power of

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attorney to accept service or to be served with all process which might be issued in this State against such company. The necessary effect of this statutory safeguarding is to make a foreign insurance company a domestic corporation with respect to suits growing out of matters occurring in this State: *Coal Co. v. Steel Company*, 15 Cates, 528. The case to which we have just referred does not deal exactly with the case at bar, but its reasoning clearly includes or has reference to cases such as those at bar. But if it were an original proposition, Code Section 3295 should be construed as an agreement upon the part of the insurance company with the State that the company may be sued here just as if it had been locally organized: 19 Cyc., 1329. As a matter of course, if it is suable here upon process served upon the insurance commissioner, a decree rendered against it is binding everywhere. Hence, the authorities pressed upon us by able counsel to the effect that a judgment rendered without service of personal process is void are not in point. Insofar as the complainant in error is concerned, the judgment must be treated as a decree upon executed process.

But a decree *pro confesso* does not deprive a party of the right to appeal or sue out a writ of error: *Cowan v. Wells*, 5 Lea, 682. The entry of a *pro confesso* order is simply an admission of the averments of fact, and is not an admission of legal conclusions. Hence, if a decree, although pronounced upon a *pro confesso* order, is manifestly erroneous when tested by the record and the law, it must be reversed.

As stated at the outset, the effort to invoke the aid of a Court of Equity in a case of this nature is somewhat new; but complainant should not be repelled for this reason if there can be discovered well-known equitable principles or grounds upon which the proceeding can be sus-

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tained. After carefully pondering this matter, we have reached the conclusion that complainant had grounds, apprehensions and reasons for appealing to a Court of Equity to adjudge her rights, and to equip herself for the future, and to relieve herself from any fears as to what might transpire; and this without any prejudice whatever to the rights of the complaining insurance company. She desired three things—namely: An ascertainment of the extent of the indebtedness of Eugene Barrow, an adjudication that this indebtedness was a lien upon the policy which she held, and a decree informing the insurance company of the extent of her claim against the policy or its proceeds.

It becomes pertinent at this point to determine the legal and equitable effect of the assignment of the policy to complainant. She certainly stands as the pledgee or mortgagee of the document. In other words, it was hypothecated to her to secure indebtedness and advances. This created a subject-matter and a relationship of equitable cognizance. It will not do to say that she is the owner of the entire policy and its proceeds. On the contrary, she is entitled to so much only of these proceeds as will indemnify her. We say this for the reason that the policy was assigned to her husband as a creditor and to the extent only as his interest may appear. An assignment of this character does not vest the assignee with the right to the whole of the proceeds, but to that portion only needed to indemnify him: *Barrett v. Ins. Co.*, 99 Ia., 106; 25 Cyc., 772, 773. Hence, there was a reason for her application to a Court of Equity to have the extent of her interest in the policy fixed as a guide and as a quasi-preservation of her evidences of indebtedness. These facts justify the interposition of a Court of Equity upon the additional ground that the complainant fears that her rights may be prejudiced or endangered by lapse of time, etc. 14 Cyc., 102.

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Again, complainant occupies the relation of quasi-trustee or mortgagee, of which relation the company was cognizant, and to which, according to the documentary evidence, it was in a manner a creator or party. It was aware of the relations between Eugene Barrow and John D. Barrow, and in fact at the time the assignment of the policy was actually made, it was the recipient of a part of the funds which had been paid in consideration of the assignment of the policy to John D. Barrow. The company was and is therefore so implicated with the complainant and Eugene Barrow as to sustain toward complainant an equitable relation such as affords a basis for an adjudication which is preservative of complainant's rights.

The rights of lienholders and assignees of choses in action as pledgees have long been of equitable cognizance; and notwithstanding that by the rules of the common and statutory law their remedies are in a great measure provided, this equitable jurisdiction remains practically undisturbed: 16 Cyc., 88. Accounting is likewise a well-known source of equitable jurisdiction: *idem*, 104.

Complainant by apt averments presents practically all these matters, and requests the aid of a Court of conscience. And this brings up again the question as to whether this is a personal recovery. The rule invalidating personal judgments against non-residents has no application to proceedings with respect to property within the jurisdiction of the decreeing Court. In the case at bar complainant averred and proved that she had this policy in her possession, and she asserted her right to have a lien or charge fixed thereon. It may well be said, therefore, that as the hypothecatee of a chose in action, she had the right to a decree fixing her claims thereon, and that this is a quasi-action in *rem*.

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While pressed with great earnestness, we feel constrained to discount the insistence of learned counsel for the insurance company that this decree is premature. This may, in a manner, be true. At the same time, complainant was, as we think, in view of the admitted averments of her bill, entitled to an adjudication that she is a lienholder against an obligation which the insurance company owes or will, in the course of events, owe upon a document held by her. The writ of error is denied with costs.

N., C. & ST. L. RAILWAY COMPANY V. JOHN A. CATHEY
AND WIFE.

Writ of certiorari denied by the Supreme Court.

(*Jackson*. April Term, 1914.)

1. RAILROADS. *Carrier of passengers. Separation of races. Liability for mistake.*

It is the duty of the conductor of a passenger train containing separate coaches for white and colored races as provided by Act of 1891, Chapter 52, to exercise reasonable care in ascertaining the race to which a passenger belongs and to exercise reasonable care in assigning passengers to the proper coaches. If the conductor in arriving at this conclusion makes an honest mistake as to the race to which a party belongs, exercising at the same time reasonable care and diligence and judgment to ascertain this fact, the railroad company is not responsible in damages.

2. SAME. *Liability in case of negligence.*

But a railroad company whose conductor fails to exercise ordinary care, diligence and judgment in ascertaining the race to

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which a party belongs, may be held liable for substantial damages therefor, and may under certain circumstances be held liable for punitive damages.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Division No. 2. D. WALTER MALONE, Judge.

G. T. FITZHUGH for Plaintiff in Error.

JERRE HORN and L. T. M. CANADA for Defendants in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS was an action brought by the defendants in error, John A. Cathey and wife, Clara P. Cathey, in the Circuit Court of Shelby County, against the railroad company, to recover damages for an alleged insult offered to Mrs. Cathey while a passenger on one of the defendant's trains by the conductor in charge of said train, consisting of calling her a negress, and attempting to compel her to go in the coach provided for negro passengers; Mrs. Cathey being a white woman of refinement and culture.

The railroad company pleaded the general issue.

The case was tried before the Circuit Judge and a jury, and at the conclusion of all the evidence, both the plaintiff and the defendants moved the Court to direct a verdict in their favor, respectively. Thereupon, it was agreed by and between the parties that the jury should be dispensed with, and the trial Judge should hear and determine the case without a jury, and a request was made by counsel of the

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Court that he make and file a special finding of facts, and his conclusions of law thereon, in writing, which was done, and the same constitute a part of the record in the case.

While the Circuit Judge does not set out in his written findings, specifically, all the facts found by him, he does find the conductor's version of the trouble to be true, and there was no exception taken by either of the parties to the written findings filed by the Circuit Judge, and no request made for any additional finding of facts.

The Circuit Judge found that the conductor did mistake Mrs. Cathey for a negress, but in doing so, acted under the honest belief that she was one, and that the mistake was not willfully or wantonly made; but that the conductor failed to exercise ordinary care in determining the race to which Mrs. Cathey belonged; that she was entitled to recover for said indignity, and rendered judgment against the railroad company for \$1,500, damages, from which judgment the railroad company appealed to this Court, after its motion for a new trial had been overruled, and has assigned errors.

There being no exceptions to the written findings of the trial Judge, which, as before stated, found the version of the conductor to be the true facts in the case, we must accept the conductor's version of the matter. His version was, that on the 16th day of November, 1911, he was running a passenger train between Nashville and Lebanon, Tennessee; that he got into Lebanon on his return trip from Nashville at 10.35 A.M., got his dinner at his home and started back to the depot about 12.10 P.M., for the purpose of taking his train back to Nashville, which was due to leave Lebanon about one o'clock P.M. On his way to the depot he says a colored man passed him in a buggy with a colored woman; that he glanced at the woman in the buggy, who was a mulatto of large size—about the size

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of Mrs. Cathey, whom the conductor says he did not know; that the colored woman had on a hat and veil similar to that which Mrs. Cathey wore; that when he reached the depot he went into the car set apart for white persons, and found only one person in the car—a woman whom he says he honestly believed to be the woman he had seen in the buggy coming to the depot with the colored man, but who afterwards turned out to be Mrs. Cathey. He says he went up to her in a courteous way and “asked her if she knew the law in Tennessee,” and she replied that she did. He says he never made any further remarks to her at that time, but to satisfy himself as to her race, and to discharge his duty under the law in the matter of keeping the races separated on his train, he went out and secured the colored man, whom he believed had brought the woman to the depot, and accompanied him into the car where Mrs. Cathey was, and, in her presence, asked the colored man: “Is this the party you brought to the depot?” The colored man said: “It is not, that was a colored woman, Sallie Gordon, my sister.” Thereupon, Mrs. Cathey said: “I suppose you take me to be a negro.” The conductor says he immediately replied: “Madam, I made an honest mistake, and I beg your pardon.” He says Mrs. Cathey began weeping, and would not accept any apology of any kind from him, though the trial Judge found that the conductor never afterwards manifested anything except the most complete and thorough repentance and remorse, and that while the mistake was honestly made, it was the result of negligence on the part of the conductor.

It is insisted by the first assignment of error that the findings of the trial Judge were insufficient to warrant his conclusions of law; but that on the facts found by him, there was no liability on the part of the railroad company, and a judgment should have been rendered in its favor.

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By another assignment it is insisted that the damages assessed by the trial Judge, in any event, were grossly excessive, in view of the Court's findings that the mistake of the conductor was an honest one, and was not willfully or wantonly made.

Under the Act of 1891, chapter 52, it is made the duty of all railroads carrying passengers in the State (other than street railroads) to provide equal but separate accommodations for white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations for them. An exception, however, is made of colored nurses who may be traveling with any white person, it being provided that such white person may take said nurse into the car or compartment provided for white passengers.

By section 2 of said Act, it is provided that the conductors of passenger trains shall have power, and are required to assign to the car or compartments of the car, when it is divided by a partition, used for the race, to which such passengers belong, and should any passenger refuse to occupy the car to which she or he is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train; and for such refusal neither he nor the railroad company shall be liable for damages in any Court of the State.

By section 3 of said Act, it is provided that all railroad companies that shall refuse, fail, or neglect to comply with the requirements of section 2 of said Act, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$100, nor more than \$500; and any conductor that shall fail, neglect or refuse to carry out the provisions of said Act shall, upon conviction, be fined not less than \$25 nor more than \$50 for each offense.

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Under the Act referred to it is clearly the duty of conductors in charge of passenger trains to determine the race to which passengers belong and keep them separated in the manner prescribed by said Act, and he must exercise ordinary care in doing so, and if, while in the exercise of ordinary care, he makes an honest mistake in determining the color or race of a passenger falling within the provisions of said Act, the railroad company is not liable for such mistake. *Southern Railway Co. v. Thurman*, 121 Ky., 716; 90 S. W., 240; *L. & N. Railway Co. v. Catron*, 102 Ky., 323, 43 S. W., 443; *Norfolk & W. Ry. Co. v. Stone*, (Va.), 69 S. E., 927; *L. & N. R. R. Co. v. Ritchel*, 148 Ky., 701, 41 L. R. A. (N. S.), 958, and note.

The Circuit Judge, in his written findings of facts, found that the mistake of the conductor, in the case under consideration, was the result of negligence on his part. We think there is evidence in the record to support this finding. It is not claimed by the conductor that there was anything about the complexion of Mrs. Cathey or in her features that indicated that she was a negress. The only thing that induced him to believe that she was the same woman he had seen in the buggy with the colored man was her size and the hat and veil she wore. The veil she wore dropped just below the brim of her hat, and her features were fully exposed to the view of the conductor. He does not claim that Mrs. Cathey resembled a negress in features, or that her complexion presented a dusky hue, or any other evidence that she had negro blood in her veins. He admits further that it was not necessary for him to bring the colored man, Frank Drake, into the car and in the presence of Mrs. Cathey, in order to verify his belief that she was the same woman whom he had seen in the buggy with him, but that this information could have been ascertained from Drake without bringing him into the presence of Mrs. Cathey.

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We think the trial Judge was correct in finding that the conductor failed to exercise ordinary care with respect of the duty imposed upon him by statute, and that the railroad company is liable to the plaintiffs for some damages. The indignity was such as to cause humiliation to Mrs. Cathey.

We think, however, that the judgment rendered by the Circuit Judge is grossly excessive, in view of the fact that there was no intentional wrong on the part of the conductor, and the further fact that Mrs. Cathey suffered no physical injury, except more or less nervousness occasioned by the indignity. It further appears that there were no other passengers in the car at the time, which fact must be considered in determining the amount of damages to be recovered. It also appears that the conductor, immediately upon discovering his mistake, as found by the trial Judge, offered a thorough and most abject apology, which should also be looked to in considering the question of damages.

We are of opinion that the sum of \$250 would be fair compensation for the plaintiffs under all the facts, and the judgment will be so modified as to allow the plaintiffs a recovery for this amount.

The railroad company will be taxed with all the costs of the case.

Drake v. Currier.

C. E. DRAKE v. JOHN M. CURRIER, ET AL.

Writ of certiorari denied by the Supreme Court.

(Knoxville. September Term, 1913.)

1. **MARRIAGE LICENSES.** *Liability of clerk for issuing without consent of parent or guardian.*

A County Court Clerk is not subject to suit in a civil action for issuing a marriage license to a female under sixteen years of age without the written consent of the father and mother or guardian of said infant.

2. **SAME.** *Action for penalty under section 4195, Shannon's Code.*

Nor can suit be brought for the penalty of \$500.00 denounced by section 4195, Shannon's Code, against County Court Clerks who knowingly issue licenses to persons incapable of entering into a valid marriage contract, in cases where the clerk has issued licenses to female minors under sixteen years of age without the written consent of the parent or guardian of such minor.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
V. A. HUFFAKER, Judge.

JOS. W. SNEED and HARRY HALL for Plaintiff in Error.
GREEN, WEBB & TATE for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS suit was instituted by the plaintiff in error, C. E. Drake, against the defendant in error, John M. Currier,

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before a justice of the peace of Knox County, to recover a penalty of \$500. There was a judgment in favor of the defendant in error in the Court below, where the case was heard upon demurrer, and the plaintiff in error's suit dismissed. He has appealed to this Court, and has assigned errors.

The warrant as originally issued cited the defendant, who was the County Court Clerk of Knox County, to appear before the justice issuing the warrant, or some other justice of the peace of said county to answer the complaint of the plaintiff in error, C. E. Drake, "in a plea of debt due by account, action of debt, penalty for violation of statute, Acts of 1899, chapter 26, and section 4195 of Shannon's Code, under \$500."

The demurrer alleged three grounds for the dismissal of the suit: (1) That the warrant did not allege in what manner the statute and the section of the Code referred to had been violated; and (2), that the suit purported to be an action for a penalty based on a violation of a statute, and, therefore, that the suit should have been brought in the name of the State on relation of the plaintiff in error; and (3), that the warrant alleged no such violation of any statute as entitled the plaintiff in error to recover in said action.

Thereupon, the warrant was amended so as to allege that the defendant in error issued or caused to be issued a marriage license to the plaintiff's daughter, _____ Drake, she being under the age of sixteen years at the time said marriage license was issued by said defendant, and the same being issued without the written or verbal permission of the parents of said _____ Drake, as provided by the Act of 1899, chapter 26, and in violation of section 4195 of Shannon's Code.

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We are of the opinion that the demurrer was properly sustained. Section 4195 of Shannon's Code provides as follows: "If a clerk knowingly grants a marriage license to persons incapable thereof, he shall forfeit and pay a fine of \$500 to be recovered by action of debt for the use of the person suing."

By the Act of 1890, chapter 26, which is brought into Shannon's Code Supplement at section 4192 thereof, it is provided:

"No County Court Clerk in this State shall issue a license to authorize the marriage of any persons either one of whom at the time shall be under the age of sixteen years, unless written permission thereof is furnished, to be preserved in the County Court Clerk's office, signed by the father, or if he dead, then by the mother, or if she be dead, then by the guardian of such person applying for such license or for whom such application is made. Any Clerk or Deputy Clerk knowingly violating this Act shall be guilty of misdemeanor."

It is insisted by the plaintiff in error that his daughter, under the provisions of the statute above quoted, was incapable of contracting marriage, and, therefore, he is entitled to recover the penalty provided in section 4195, hereinbefore quoted, and that the Circuit Judge committed error in sustaining the demurrer.

We are of the opinion that this contention is not sound. The Act of 1890, chapter 26, does not give any right of action to the parent who may be aggrieved by the act of the County Court Clerk in issuing a marriage license to his daughter under sixteen years of age, without his written permission. The Act does nothing more than prescribe a penalty, which is purely criminal in its nature, for its violation, and can only be enforced by a criminal prosecution. So, if the plaintiff in error is entitled to re-

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cover at all, it must be under the section of the Code hereinbefore referred to.

We are of the opinion that the section referred to has no reference to marriages of the character of the one in question. A female over twelve years of age but under sixteen, is not incapable of contracting marriage. The marriage is neither void nor voidable. We are of the opinion that section 4195 of Shannon's Code has reference to parties who are incapable of contracting marriage, on account of the existence of some legal obstacle which incapacitates him or her to make a matrimonial contract, such, as a female under twelve years of age, or a male under fourteen years of age, or a person having a living husband or wife. It does not have reference to a mere limitation like the one imposed by the Act of 1899, which in no way affects the validity of the marriage.

In the absence of a provision in the Act of 1899, authorizing the recovery of the penalty sued for, and being of the opinion that section 4195 has no application to the matter complained of, the plaintiff's suit must fail. In the absence of a statute so providing, a parent has no right of action against a clerk for the wrongful issuance of a marriage license to his minor child. *Holland v. Baird*, 32 Am. Rep., 360; 26 Cyc., 825. The Act of 1899 gives no such right of action, and as already stated, we are of the opinion that section 4195 of the Code does not apply to a marriage license issued by the clerk under the circumstances alleged in the warrant.

The judgment is affirmed with costs.

Vaughn v. Williams.

H. R. VAUGHN, ADM'R., v. CAREY WILLIAMS, ET AL.

Writ of certiorari denied by the Supreme Court.

(*Nashville*. December Term, 1913.)

1. PLEADING AND PRACTICE. *Payment. Burden of proof.*

Payment is an affirmative defense which must be made in the answer or by plea and sustained by the proof. There is no presumption of payment. When complainant establishes the existence of the debt sued upon the burden of showing the payment or extinguishment of the obligation is upon the defendant.

2. SAME. *Suit filed against administrators, etc.*

This rule obtains in suits by or against administrators and executors whether brought in a common law or Chancery Court.

FROM SMITH COUNTY.

Appealed from the Chancery Court of Smith County.
A. H. ROBERTS, Chancellor.

L. A. LIGON and H. B. MCGINNIS for Complainant.

W. C. DAVIDSON for Defendants.

MR. JUSTICE HALL delivered the opinion of the Court.

IN this cause, which is an insolvent proceeding coming from the Chancery Court of Smith County, Champ Williams recovered a decree against appellants, L. A. Ligon

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and H. B. McGinness, administrators *de bonis non* of the estate of J. W. Williams, deceased, for the sum of \$788. The account of Williams, upon which this recovery was sought and based, is composed of some four or more items, one of which was for \$213, representing an alleged indebtedness due appellee Williams from the estate of his deceased brother, J. W. Williams, growing out of a horse and mule trade had between them in October, 1908, and before the death of J. W. Williams, which occurred in the year 1910.

From so much of the Chancellor's decree as allowed appellee a recovery for the \$213 above referred to, the administrators have appealed to this Court and have assigned errors. There was no appeal from the other items of the decree.

Upon a hearing of the cause in the Court below appellee Williams offered testimony as to the transaction, out of which he claims the item of \$213 alleged to be due him from his brother's estate, arose, but, upon objection by appellants to his testimony, it was excluded, and no exception was taken by appellee to the action of the Court in excluding said testimony. Appellee introduced another witness by the name of Willard Smith, who testifies that he was present at appellee's barn at Celina, Tennessee, about October, 1908, when appellee swapped two mules to appellants' intestate, J. W. Williams, for a sorrel horse, and that J. W. Williams agreed to pay appellee the sum of \$213 as the difference between the two mules, the collars then on them and the horse; that J. W. Williams did not pay appellee the difference then, nor did he give appellee any note for the difference; but did agree to pay appellee this amount as a part of the consideration of said trade. Smith says, that so far as he knows, there was no set time agreed upon when the difference should be paid, and

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there is no evidence in the record tending to show that this difference was ever paid by J. W. Williams in his lifetime.

It is insisted by appellants, under their assignment of error, that the evidence of Smith does not establish the estate's liability for the item of \$213. It is insisted, that to entitle appellee to a credit for this item of his account, it must be shown that it was due him from J. W. Williams at the time of the death of the latter, and that this has not been done either directly or circumstantially. It is insisted that there is no presumption of law, upon it being shown that the debt once existed, that it continued to exist until payment is shown. In other words, the gist of the contention of appellants is, that it is not sufficient to show that the debt was contracted by their intestate, but that appellee must go further and show that the indebtedness was owing to him at the time of the death of their intestate.

We are of opinion that appellants' contention is not sound. Upon appellee showing that the debt once existed, it devolved upon appellants to show by some competent evidence, either direct or circumstantial, that the debt had been paid.

"The general rule is well settled that payment is an affirmative defense and will not, in the first instance, be presumed, but after the antecedent existence of the indebtedness has been proved by the creditor, the burden of proving its discharge by payment is upon the debtor or person alleging the payment." Am. & Eng. Encyc. of Law, Vol. 22, 587, and the many cases there cited.

It appearing from the uncontradicted evidence of the witness Smith that the debt was contracted by the deceased, J. W. Williams, and once existed, the burden of proof was on appellants to show that the debt had been paid.

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The decree of the Chancellor is affirmed with costs, and the cause will be remanded for further proceedings.

W. U. TELEGRAPH COMPANY V. D. C. HICKS AND WIFE.

1. **TELEGRAPH COMPANIES.** *Negligence with respect to delivery of message beyond town delivery limits where message indicates postoffice delivery.*

A telegraph company to whom was delivered for transmission a message addressed as follows: "Mrs. Lum Hicks, R. F. D. No. 2, Jellico, Tenn.," cannot be held guilty of negligence with respect to the delivery of said message if the agent at the receiving office, within a reasonable time after receiving the same, dropped the same in the United States mails in an envelope addressed as indicated in said message, although it was known to the agent that the next day would be a holiday for the carrier upon route No. 2, and that the message would not be delivered until the day after the succeeding day, provided of course the sendee lived beyond the city delivery limits.

2. **SAME.**

Such address will be construed by the Courts as a direction to the receiving agent to use the mails as the means of securing delivery thereof, and the company cannot be held responsible in damages by following this suggestion.

FROM CAMPBELL COUNTY.

Appeal in error from the Circuit Court of Campbell County. ZEN HICKS, Judge.

SHIELDS & CATES and OWENS & TAYLOR for Plaintiff in Error.

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JOHN JENNINGS, JR., for Defendants in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

AN action instituted by D. C. Hicks and wife, Sarah Ann Hicks (D. C. Hicks being commonly known in the vicinity where he lived as Lum Hicks), against the Western Union Telegraph Company, before a justice of the peace of Campbell County, to recover damages for the negligent failure to promptly deliver a telegram.

Upon the case being finally carried to the Circuit Court of the county, where a trial was had before the Court and a jury, a verdict and judgment were rendered against the telegraph company for the sum of \$250 damages, from which it appealed to this Court, after its motion for a new trial had been overruled, and errors have been assigned.

The telegram in question was delivered to the plaintiff in error by B. F. McNew at its office at Fairbury, Nebraska, on November 29, 1911, and read as follows:

"Mrs. Lum Hicks, R. F. D. No. 2, Jellico Tenn.

"Arrel died today. Wire if you can come.

"(Signed) B. F. McNew."

The Arrel referred to in said telegram was a brother of the sendee, Mrs. D. C. Hicks, and lived at Fairbury, Nebraska, at the time of his death, which occurred on the date of the sending of the above telegram.

The telegram was received by the plaintiff in error at its Jellico office at 10.45 o'clock on the morning it was delivered to the initial office in Fairbury, and in accordance with the company's rules and custom at Jellico, when a message is received by it directed to a person on a rural free delivery route leading out from Jellico, it was

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deposited in the postoffice at Jellico for delivery. It appearing that the sendee lived beyond the free delivery limits of the Jellico office. The company's free delivery limits at Jellico being one-half mile. The undisputed evidence is that the sendee, Mrs. Hicks, lived about two miles from the company's Jellico office, on rural route No. 2.

The message was placed in the postoffice at Jellico by the plaintiff in error's operator within a few minutes after it was received, which was too late for it to be carried out by the rural route carrier on that day, he having gone out on his route about seven o'clock in the morning. The following day, Thursday, was Thanksgiving day, and no mail was carried out on route No. 2 on that day. Therefore, the telegram was not carried out on said route until Friday, the day after Thanksgiving. The sendee did not go to the box, where she was accustomed to receive her mail, until Saturday morning, when she received the telegram four days after its delivery to the company at its Fairbury office, and too late to attend her brother's funeral. She says if she had received the telegram promptly she would have wired her brother, B. F. McNew, and could and would have gone to Fairbury and been present at the funeral. Her husband also testified that he was able to and would have furnished her transportation to Fairbury.

The evidence fails to show that there was any arrangement made by the sender with the telegraph company for the delivery of the telegram to Mrs. Hicks by a special messenger. Nor is there any evidence tending to show that the sender had knowledge of the company's free delivery limits at Jellico.

By the first error assigned it is insisted that the Court below erred in not directing a verdict in favor of the plaintiff in error, upon its motion, made at the close of all the evidence in the case.

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It is insisted by the plaintiff in error that the message in question having been addressed to the sendee on a rural free delivery route, beyond the city of Jellico, and beyond its free delivery limits, it was not required to deliver said message to the sendee by a messenger, in the absence of an arrangement with the company to that effect, and the payment of a special charge for such delivery; and that when it placed said message in the postoffice at Jellico, the terminal office, to be transported by the regular course of the United States mails to the sendee on said rural route, it complied with its contract, and no recovery can be had against it for any delay that may have occurred after the message was deposited in the postoffice at Jellico.

We are of opinion that this contention is well grounded. The message which was sent to the plaintiff clearly showed that Jellico was the terminal office in the line of defendant, to which the message was to be sent, and that the message, when received at that office, would have to be transferred to the mails for delivery to the plaintiff. We think it clearly appears that it was intended by the sender, that when the message was received at the terminal office, it should and would be transported through the mails to the sendee on the rural route designated on the message itself. If this were not true, why was the rural route upon which the sendee received her mail designated on the message? If it were intended that the message should be delivered to the sendee by a messenger upon its receipt at Jellico, and then given to a special messenger and carried to the sendee at her residence on the rural route mentioned, why was it not simply addressed to the sendee at Jellico, without the prefix "R. F. D. No. 2"?

The evidence shows that the sender knew that the sendee lived out from Jellico on rural route No. 2. While it

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does not expressly appear that he knew the distance she lived from Jellico, it is apparent that he knew she lived beyond the limits of the town, and in all probability several miles therefrom.

We think the case of *Gainey v. Telegraph Co.*, reported in 136 N. C., 264, is directly in point. The message in that case was addressed as follows:

"Mr. Noel Gainey (P. O., Idaho), Fayetteville, N. C.

"The doctor is dead. Write if you can come. Died at 7.45 today. MRS. W. E. GAINNEY."

The Court, in passing upon the case, said:

"The message which was sent to the plaintiff clearly indicated that Fayetteville was the terminal office on the line of defendant to which the message was to be sent, and that the message, when transmitted from Live Oak and received at that office, would have to be transferred to the mails for delivery to the plaintiff. If this is not true, why was there a double address, one to Fayetteville and one to Idaho? There is another significant fact in the case: The message was not only addressed to Fayetteville as the farthest reach of the telegraph service; but Idaho was indicated, not as a place merely of the plaintiff's residence in the vicinity of Fayetteville, but as his postoffice or place where he received his mail. If the parties intended that the message should be sent to Fayetteville and then given to a special messenger and carried to the sendee at Idaho, why not use the simple word 'Idaho,' without the prefix 'P. O.'? But if it was their purpose that the message should go to Fayetteville by wire, and then a written copy be mailed to the sendee at Idaho, it would be perfectly natural to use the prefix, and we can readily understand in such a case why it should have been done."

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In *Taylor v. Telegraph Company* (Ky.), 123 S. W., 311, it was held that where a telegraph company received a message addressed to a postoffice box, it performed its contract when it placed the message in an envelope, correctly addressed, in the postoffice within a reasonable time, though the sendee did not receive the message, for the address designated the place of delivery.

In that case the message was addressed to the sendee, S. J. Taylor, P. O. Box 167, Paducah, Kentucky. The defendant company, upon the receipt of the message at its Paducah office, promptly deposited it in the postoffice for delivery.

In *King v. Telegraph Company* (Ark.), 117 S. W., 521, a message to be telegraphed plaintiff at L. was given the operator, who was told of its importance, and that plaintiff lived in the country, four miles from L., and was asked his charges for sending and delivering. Twenty-five cents, the amount he stated, was paid; but this was the regular charge for sending to and delivering at L., and nothing was said by either the operator or the sender about extra charges for messenger service. The message was promptly received at L., the delivery limit for which was half a mile from the office, and it was found that plaintiff was not in town, that she lived six or eight miles in the country, whereupon the message was mailed to her at L. Held, that there was no negligence in the company's failure to deliver by a messenger.

We are of opinion that there is nothing in the case of *McCaul v. Telegraph Company*, 114 Tenn., 661, that conflicts with our holding in the case at bar. We do not think that there was any implied obligation resting upon the plaintiff in error to deliver the message in question by a special messenger, in view of the double address, to the sendee's residence, in the absence of a special arrangement

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between the parties that it should be done. We think the company had the right to assume that it was contemplated by the sender that when the message reached the terminal office, it would be deposited in the mails, and in that way be delivered to the sendee. If this were not true, as before indicated, there can be no reason for the sender prefixing the rural route upon which she lived.

It results that we are of opinion that the Court committed error in not sustaining the motion for a directed verdict. Therefore, it will be sustained here, and the plaintiffs' suit will be dismissed with costs.

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C. C. HICKS v. JAMES WALKER, ET AL.

1. FRAUD AND DECEIT WITH RESPECT TO AGENCY. *Aiding a party in the purchase of land without disclosing employment by seller.*

A party who offers to or agrees to assist another in the purchase of land as a friend and as an act of kindness is guilty of fraud and deceit in representing the seller in promoting the trade, at the same time failing to disclose this fact to the party for whom he is ostensibly acting; and he may be held liable to an accounting for any profits he may have made in the transaction or responsible in damages to the party who requested him to act.

2. SAME. *Reduction of price. Cancellation of notes.*

In such case the purchaser may file a bill to require the intervening party to account for profits; and if the compensation paid by the original seller to this party guilty of deceit consists of purchase money notes given by the purchaser to the seller, the collection of the notes may be enjoined.

FROM McMINN COUNTY.

Appealed from the Chancery Court of McMinn County.
V. C. ALLEN, Chancellor.

EUGENE IVINS for Complainant.

CLEM J. JONES for Defendants.

MR. JUSTICE HALL delivered the opinion of the Court.

THE bill in this cause was filed to enjoin the collection of, and have delivered up and canceled, two notes for \$500,

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alleged to have been fraudulently obtained in the following manner:

Prior to the month of October, 1912, the complainant Hicks was a resident of Cocke County, Tennessee. He sold his little farm in that county, and went to McMinn County, with a view of purchasing a farm there. The defendant Walker had formerly lived in Cocke County, but had, some years previous to the transaction out of which this litigation grew, removed to McMinn County, and was residing in McMinn County at the time the complainant visited said county with a view of purchasing a farm. Before going to McMinn County complainant was advised by a Mr. Woods of Cocke County, who knew the defendant Walker well, to go to see Walker; that Walker could, perhaps, assist him in purchasing a farm in McMinn County. Complainant knew Walker by reputation, and knew that Walker had formerly been a school teacher in Cocke County, and he believed him to be a man of integrity. Thinking that Walker was familiar with land values in McMinn County, and that he might be of assistance to complainant in purchasing a farm in that county, he went to see Walker, and told Walker that he desired to purchase a farm in said county, and informed him that he (complainant) had been advised to come and see him by their mutual friend, Mr. Woods. Complainant asked Walker if he knew of any farming lands for sale in that county. He says that Walker told him that he would be glad to render him any assistance that he could in purchasing a farm; that he would like to get a number of Cocke County citizens to move to that county and buy farms, and that he knew of a farm in the locality where he (Walker) lived, that could be purchased for \$7,000, and was a bargain at that price. He proposed to go with complainant to see said farm, and they did go

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the next day and look it over in company with the owner, Jerry Pardue. After they had looked at the farm, and while returning to the house of Pardue, the defendant Walker and Pardue walked in front of the complainant and seemed to be holding a conversation, after which, the defendant Walker dropped back to where complainant was, and told him that the farm could not be purchased for less than \$7,000, and that he (complainant) need not ask Pardue to reduce the price. Complainant told Walker that he was not able to pay that price for a farm. Walker advised him to buy it, telling complainant that it was a bargain; that he had rather have it than the Garrison farm, which was situated in that locality, and had recently sold for a much larger sum. Defendant told complainant that if he would purchase the farm he (defendant) would get Pardue to arrange the payments so that he would have no trouble in meeting them.

Pardue, who was examined as a witness, admits that he heard the defendant Walker make this statement to complainant, but remained silent.

Complainant did not purchase the farm on that trip, but asked Pardue if he would give him two or three days in which to consider the matter, and Pardue told him that he would give him as much time as he wanted. Complainant went to Sweetwater that day and spent the night, and while at Sweetwater he decided that he would take the farm. He returned to the defendant Walker's home, told him of his decision, and asked Walker to go with him to Pardue for the purpose of closing the deal, and told Walker that he wanted him to assist in having prepared a proper deed for the land. Walker did accompany him, and the deal was closed at the price of \$7,000, complainant paying \$2,000 of the consideration in cash, and executed his ten notes for \$500 each, maturing on the first

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day of January of each year thereafter until the entire series became due, and a deed was executed by Pardue to complainant for the land, in which a lien was expressly retained for the payment of said notes.

It appears; in fact, the evidence is undisputed on that point, that the price at which Pardue held the farm was only \$6,000, and this was well known to the defendant Walker at the time he induced complainant to pay \$7,000 for it. Complainant says he relied on the statement of Walker that the farm could not be purchased for less than \$7,000, and, therefore, did not discuss the price with Pardue. Complainant says, in substance, that he had implicit confidence in the integrity of Walker; believed that he was his friend, and was doing all he could to assist him. It appears that \$6,000 was Pardue's sale price to purchasers generally, and he says he would have sold the farm to complainant at \$6,000.

It appears that after the sale, the defendant Walker went to Pardue and demanded two of the \$500 notes as his compensation for making the sale, and Pardue indorsed to him, or rather to the defendant's wife, the last two notes, as compensation for his services in making the sale. These two notes were indorsed to the defendants' wife, who is also a defendant to the bill, at the request of the defendant Walker, and Mrs. Walker was the holder of these notes at the time the bill in this cause was filed.

It appears that Walker paid Pardue fifty cents as a consideration for indorsing the notes. This was done, according to the proof, so that it could be stated by Walker and Pardue that a consideration passed from Walker to Pardue for the notes. Pardue and Walker both agree that it was understood between them that the turning over of the notes to Walker was to be kept a secret. The evidence shows that Mrs. Walker knew all the about the transac-

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tion, and that she furnished her husband the fifty cents that morning before he left home, which was turned over by Walker to Pardue.

It is insisted by Walker that the reason he had the two notes indorsed to his wife was, that he owed his wife some \$1,500 or more, which he had borrowed from her before removing from Cocke County, and that he had these notes indorsed to her in part payment of that indebtedness. He admits, however, that the \$1,500 he borrowed from his wife was invested in a farm in McMinn County by him, and the title was taken in his wife's name.

We are clearly of opinion that Walker did not have the two notes indorsed to his wife for the purpose of paying any indebtedness that he might owe her, but that he had the indorsement made for the fraudulent purpose of putting the notes beyond the reach of complainant through a Court of Equity, and to prevent them from being canceled in his hands.

We are of opinion that the conduct of Walker towards the complainant was of the most fraudulent character, and he cannot be permitted to profit by his fraud and deceit of a man who implicitly relied on his integrity, and whom he professed to be gratuitously assisting and befriending. It was by the fraudulent conduct of Walker, and by his misrepresentations, that complainant was induced to pay \$1,000 more for the land than he would otherwise have had to pay, and this \$1,000 represents the profits of Walker.

In *Moinett v. Davis*, 1 Bax., 434, it was held that such party holds such profits for the benefit of the party whose confidence he has abused, and where circumstances of fraudulent bad faith and undue advantage is found, the rule is rigidly enforced.

Railway Co. v. Pounders.

The Chancellor granted the relief sought by the bill, and ordered the notes, which were produced and filed as a part of the record in the cause, canceled in the hands of the defendants.

We are of opinion that there is no error in the decree, and it will be affirmed with costs.

N., C. & ST. L. RAILWAY COMPANY V. A. T. POUNDERS.

Writ of certiorari denied by the Supreme Court.

(Knoxville. September Term, 1913.)

1. CARRIER OF FREIGHT. *Failure to furnish car at time agreed upon.*

A common carrier may be held liable in damages for failure to furnish cars at the time and place agreed upon for a certain shipment of cattle.

2. SAME. *Notice of claim for damages.*

That provision of customary bills of lading requiring notice of loss as a condition precedent to the right to recover damages has no application in such case.

3. SAME. *Measure of damages. Evidence. Market.*

The shipper in such case is entitled to a recovery of all damages which naturally and proximately resulted from the breach of such agreement upon the part of the railway company, to be measured by the difference between the prices which would have been obtained at the point of destination if the cars had been furnished as contracted and the prices that were obtained at the time of the arrival of the delayed car.

FROM HAMILTON COUNTY.

Appeal in error from the Circuit Court of Hamilton County. NATHAN BACHMAN, Judge.

Railway Co. v. Pounders.

BROWN, SPURLOCK & BROWN for Plaintiff in Error.

JEPHTHA BRIGHT and E. L. WHITAKER for Defendant in Error.

MR. JUSTICE WILSON delivered the opinion of the Court.

THIS case is before us upon the appeal of the plaintiff in error from a judgment rendered against it in the Circuit Court of Hamilton County in two cases instituted against it by defendant in error before a justice of the peace, and which, upon appeal to the Circuit Court, were by consent, heard together by the Judge without a jury.

Both suits were instituted on the same day, March 12, 1912, before the same justice of the peace.

In one, the suit was to recover \$400 as damages sustained by Mr. Pounders because of the failure of the railway company to supply him cars and transportation for shipment of cattle from Jasper, Tennessee, to Cincinnati, Ohio, and Louisville, Kentucky, as it agreed to do.

The other was a suit to recover \$250 as damages by reason of the railway company's failure to furnish him cattle cars and transportation for shipment of cattle from Dunlap, Tennessee, to Louisville, Kentucky, in accordance with its agreement. The justice of the peace, on the same day, March 15, 1912, rendered judgment in each case against the railway company, in the case first above mentioned for \$314.40 and the cost, in the other for \$215 and the cost.

The railway company appealed each case to the Circuit Court of the county and in that Court, as stated, they were heard together by the Judge without a jury.

In one of the cases, the one first mentioned, he found and assessed the damages of Mr. Pounders at \$210 and the

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other \$25, but entered judgment for the amount of these sums with cost. The railway company moved for new trials in each case, which were overruled, and it appealed in error to the Court, both cases being brought up under one bill of exceptions.

It assigns but one error, that the Court erred in overruling its motion for a new trial because there was no evidence to sustain the verdict and judgments.

It is true that able counsel of the railway company in their brief filed before us, present an objection to the verdict and judgment, which they insist is conclusive, based upon the failure of Mr. Pounders to comply with the following condition in the live stock contracts under which the cattle were shipped:

"That, as a condition precedent to the recovery of any damages for any loss or injury to live stock covered by the contract for any cause, including delays, the second party will give in writing, notice of the claim therefor to some general officer, or to the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment, or from the place of destination, and before such stock is weighed with other stocks, such written notification to be served *within one day* after the delivery of stock at destination, to the end that such claim may be fully and fairly investigated, and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all claim, and to any suit or action brought thereon."

In our opinion there are several answers to this contention of the company.

In the first place, this clause of the shipping contract was not invoked as a defense in the trial of the case in the Circuit Court. In the second place, if it had been, it would

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have been unavailing under the undisputed facts disclosed by the evidence. In other words, it is inapplicable under the theory of the case, or the basis upon which plaintiff below sought a recovery. And, in the third place, it was not embraced in any of the grounds of the motion for a new trial.

As will be noticed from the justice's warrants sued out by Mr. Pounders in these cases, he predicates his right of recovery upon the failure of the company to supply him with cattle cars for the shipment of his cattle at the time and place it agreed to furnish them, and not for delay in transporting the cattle to destination after they were loaded in its cars. All the material evidence in the case was introduced by plaintiff below, Mr. Pounders.

The evidence establishes, or tends to establish, the following facts:

Mr. Pounders is engaged in the live stock business, and he shipped the three carloads of cattle, the foundation of these two suits, one to Cincinnati, one to Louisville, Ky., and the other to Chattanooga, although he originally intended to ship the car that went to Chattanooga to Louisville.

On January 23 or 24, 1912, Mr. Pounders saw the agent of the railway company at Whitwell and asked for two cars to be at Jasper, Tenn., on January 27, in which to ship two carloads of cattle, and the agent told him the cars would be at Jasper for him on that day. One of the cars of cattle were to go to Cincinnati, Ohio, and the other to Louisville, Ky. The cars were not at Jasper on the 27th. They did not get there until about 11 o'clock Saturday the 28th. Thirty cattle were put in the car that was to go to Cincinnati. This car of cattle weighed at Jasper 34,000 pounds, or perhaps a little more. When it arrived at Cincinnati, Tuesday morning following, the cattle

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weighed only 30,800 pounds. The cattle that went into the Louisville car was not weighed at Jasper, but the cattle weighed at Louisville 30,000 pounds.

The proof tends to show that the cattle in the Cincinnati car lost in weight about one hundred pounds a head, and the cattle in the Louisville car lost about sixty pounds a head. The proof tends to show that if the cattle had been shipped on Friday and transported promptly to destination the cattle shipped to Cincinnati would not have lost over sixty pounds a head, and the cattle at Louisville only about thirty pounds a head.

It appears from the proof that the shipper desired this cattle to be started from Jasper on Friday afternoon, so that, in the regular line of transportation, they would reach Cincinnati on Sunday, and could be put in shape for the Monday market, and the same as to the Louisville shipment.

The proof tends to show that the Monday market for cattle in Cincinnati and Louisville is better than on the following days of the week. The proof tends to show that the shipper lost about one-half a cent a pound on the cattle shipped to Cincinnati, and practically the same on the cattle shipped to Louisville.

Manifestly, under the proof, or the facts that the proof tends to show, the loss to the shipper, in the main, accrued because the cars were not at Jasper for the shipment of these cattle on Friday, when the company agreed to have the cars there, when in point of fact, it did not deliver the cars at Jasper to receive the cattle until Saturday between eleven and twelve o'clock.

The other car was to be furnished a certain day at Dunlap, Tenn., and this car did not reach Dunlap until the day after it was to be there, and, in view of this condition the shipper diverted the car to Chattanooga instead of sending it to Louisville, Ky., as he intended.

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Now, as will be noticed, the Circuit Judge found the damage to the shipper in relation to the car shipped to Cincinnati and the car shipped to Louisville to be \$210, and that the loss on the car diverted from Louisville to Chattanooga was \$25. We think there is proof to sustain the finding of the Circuit Judge as to the damage sustained by the shipper on account of the delay in furnishing the cars for the transportation of these cattle at the time the company agreed to have the cars at Jasper and at Dunlap.

The learned trial Judge, in rendering his judgment, used this language:

"I think the plaintiff is entitled to a recovery for this reason: The contract that the railroad company entered into with him was to do a specific thing. If that contract had been carried out as agreed upon, there is no getting around the point, that cattle would have been at their point of destination, Cincinnati and Louisville, earlier than they did arrive there, and, according to the preponderance of the evidence, there would have been a better market in which to sell them."

Now, as before intimated, there is no proof that there was any material delay in the transportation of the cattle after they were loaded on the cars. The delay and loss, in all material respects, occurred because the company did not have the cars at Jasper and Dunlap to receive the cattle at the time it promised and agreed to have them there.

There is evident, and material evidence, to sustain the finding of the trial Judge and his judgment will be affirmed with cost.

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R. W. COVINGTON, ET AL., v. T. J. McMURRY, ET AL.

Affirmed by the Supreme Court.

(Nashville. December Term, 1913.)

1. ESTATE BY ESTOPPEL.

An interest in real estate may be created or acquired by estoppel.

2. SAME.

A son who for years permitted his mother to claim absolutely and in fee a small tract of land adjoining that owned by her deceased husband, and who had for years spoken of this small tract as belonging to his mother, having dealt with the mother for years on the assumption that she had the fee, and having afforded other children of the mother just grounds for believing that the mother had been vested with the absolute estate, and having induced tenants, adjoining landowners and others to believe that the mother was the unconditional owner, will be held estopped to deny after the death of the mother that she was not the absolute owner of the property in question, and could not devise the same.

3. SAME. *Conveyance to third party. Innocent purchaser. Estoppel of privies.*

The general rule is that all privies in estate are estopped. Hence a vendee of the son referred to in Syllabus No. 2 is held estopped to question the title of the devisee of the mother. Nor in such case can the vendee of the son claim title as innocent purchaser.

FROM ROBERTSON COUNTY.

Appealed from the Chancery Court of Robertson County. J. W. STOUT, Chancellor.

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R. L. PECK and GARNER & GARNER for Complainants.

TRUE & DORSEY for Defendants.

MR. JUSTICE WILSON delivered the opinion of the Court.

THE bill in this cause was filed February 9, 1911, by J. W. Covington and wife, and R. A. Covington, against T. J. McMurry and J. W. Boyles, asking the Court to adjudge and decree that a contract or agreement between T. J. McMurry and his mother is of full force and effect and binding upon said McMurry, and that title to the thirty-six acres of land involved therein be divested out of said McMurry and vested in complainant, Mrs. D. A. Covington, daughter of Mrs. L. T. McMurry, and devisee under her will; that T. J. McMurry and those claiming under him, including defendant Boyles, be held forever estopped to call in question the right, title, interest and estate of Mrs. D. A. Covington in and to said thirty-six acres of land; that the deed, Exhibit B, the deed of defendant, T. J. McMurry, to his co-defendant, J. W. Boyles, be declared champertous and void and a fraud upon the rights of complainants; that an injunction issue to enjoin defendant Boyles, his agents, etc., from further prosecuting an unlawful detainer suit against complainants, Richard Covington, pending in the Circuit Court of Robertson County, Tennessee, and that on the hearing, the injunction be made perpetual, and for general relief.

Defendant McMurry was to have the remainder of the tract from and after that time, free from any and all interest his mother had had in the same; that he was to build him a dwelling house on said remaining 108 acres, move into the same, and leave his mother with her thirty-six acres upon which was situated the old home place, abso-

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lutely, she to have, hold, use and dispose of the same as she saw fit; that the services of a surveyor was secured, and, by agreement of the parties, said surveyor went upon the premises, surveyed and laid out to the widow one-quarter, or thirty-six acres of land, and he prepared and furnished the interested parties a paper writing, giving the calls, degrees, etc., describing said thirty-six acres; but, by oversight or negligence, on the part of one or both of the interested parties, defendant McMurry did not execute to his mother a deed for the said thirty-six acres, but that at this time, defendant McMurry in compliance with said agreement with his mother, built him a residence and dwelling house on the remaining 108 acres, moved into it, and has lived thereon ever since, leaving his mother in possession as absolute owner of said child's part, or thirty-six acres, to do with as she thought proper, and out of which she was to get a support and maintenance, in lieu of the agreement he made with his sisters at the time they conveyed their respective interests to him.

The bill then charges that the said act and deed of defendant T. J. McMurry in appropriating and pretending to sell said thirty-six acres to his co-defendant Boyles, was champertous and void, and is a fraud upon the rights of complainants, and that as to said act and deed they rely upon and plead the statutes of Tennessee against champerty and maintenance.

They aver that not only was Mrs. McMurry's possession of the thirty-six acres openly and notoriously adverse to all the world, but that defendant T. J. McMurry, by and through whom Boyles claims title, by both word and act, treated and recognized said thirty-six acres as being the absolute property of his mother, said McMurry at times offering and proposing to buy said thirty-six acres from his mother, offering her a

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full and adequate price for the absolute estate in fee and a price largely more than he would have given for her simple life estate therein.

It is averred that Mrs. L. T. McMurry, the mother, at times, was a very old person, and could not, in the nature of things, have been expected to live long, and thus uphold and make valuable any life estate in the property. Complainants, therefore, plead, also, and charge that the defendants, McMurry and Boyles, are estopped to now and at this late day, to call in question or dispute the title of the mother, Mrs. L. T. McMurry, or those claiming under her said will to the thirty-six acres.

It is then averred that a short time after the execution of the deed to Boyles, said Boyles claiming under said champertous deed from defendant McMurry, brought an action of unlawful detainer against complainant, Richard Covington, who was living on and having in possession said thirty-six acres of land, and had been so living on it twelve years immediately preceding the death of his grandmother, Mrs. L. T. McMurry, renting said land from her and attorning to her in every way with respect thereto.

It is averred that said suit of unlawful detainer was brought before a named justice of the peace of the county January 11, 1911, when judgment was rendered against complainant, Richard Covington, and in favor of defendant Boyles for the possession of said thirty-six acres of land.

Complainants charge that their defense to said suit is hampered by difficulties, complications and embarrassments too confusing or perplexing for investigation and solution in a Court of law, and that great and irreparable injury will be done them if suit is retained in the Court of law.

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The prayer of the bill has been sufficiently stated. A preliminary injunction issued under the prayer of the bill. Defendants T. J. McMurry and J. W. Boyles answered the bill June 27, 1911. It is not necessary, in the disposition of the case, to set out in detail their answer. It is sufficient to say that they put in issue the essential grounds upon which the relief in the bill is predicated. Their answer covers some fourteen or fifteen pages of the typewritten record. A considerable volume of proof was introduced in the case. Chancellor Stout rendered a written opinion in the case, which is brought up with the record. He sustained the contention of the defendants. The defendants, it seems relied upon the statute of frauds as a complete defense to the agreement alleged to have been entered into between McMurry and his mother with respect to the conveyance of the thirty-six acres of land to her. So holding, he dismissed the bill of complainant. His Honor held that the holding of Mrs. L. T. McMurry, the mother, was under a parol agreement as stated, and was at no time adverse to any right of defendant, T. J. McMurry, who had no claim to possession until her death, but that even if such possession had been adverse, it was at an end when she died and, during her lifetime, it could have created nothing more than a defensive right, which could not pass to a devisee under her will, or descend to her heirs.

He dissolved the injunction granted in the case and taxed complainants with the cost. Complainants excepted and prayed an appeal to this Court. The record recites that on the trial of the case, complainants excepted to the reading of certain parts of certain depositions of the defendants and the Court acted thereon, all of which is set out in the bill of exceptions of complainants.

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We should have stated that defendant Boyles, in his answer with defendant McMurry, pleaded and relied upon the fact that he was an innocent purchaser for value of the land in question from his co-defendant McMurry, and that he purchased, having no notice of any sort of the asserted claim of complainants.

Complainants assign in this Court many errors.

The learned Chancellor in his decree embodying his findings of facts, thus states them:

"Thomas McMurry died in 1871 seized of 144 acres of land and leaving surviving him a widow and three children, to-wit: Mrs. D. A. Covngton, Mrs. Empson, and defendant T. J. McMurry. Mrs. Covington and Mrs. Empson conveyed their interest in said lands to T. J. McMurry, subject to the dower and homestead rights of their mother, the said widow Mrs. L. T. McMurry, who died in 1910. More than seven years before her death, she and defendant T. J. McMurry agreed in parol to a division of said land, she relinquishing to him her right in 108 acres, and he agreeing to convey to her thirty-six acres in fee. No memorandum of this division or agreement to convey was ever reduced to writing and signed by either of the parties. At the time of the death of Mrs. L. T. McMurry, complainant Richard Covington was living with her on said 36 acres, as tenant and employe, and a short while after the death of Mrs. McMurry, defendant T. J. McMurry sold said thirty-six acres to defendant Boyles, and executed to him a deed therefor; Boyles then instituted a suit for unlawful detainer against said Richard Covington in a justice of the peace court, where judgment was rendered for said Boyles against said Covington, on which judgment, a writ of possession was issued and executed, placing Boyles in possession of said land.

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From this judgment Covington appealed to the Circuit Court of Robertson County, where the suit is now pending. This bill was filed by the said Richard Covington and his mother and father as complainants to enjoin said Circuit Court suit and to recover said land from these defendants and to divest title out of them and vest it in complainant Mrs. D. A. Covington, who claims the same under the will of her mother, Mrs. L. T. McMurry.

The defendants deny all the material allegation of the bill, and especially that McMurry ever agreed to convey said land to his mother, Mrs. L. T. McMurry; they plead and rely on the statute of frauds as complete defense to any such agreement. I am of the opinion that this plea is good, is fully sustained by the proof, and that the bill of complainant must be dismissed. The possession of Mrs. L. T. McMurry was under a parol agreement, as stated, and was at no time adverse to any right of T. J. McMurry, who had no claim to possession until the death of his mother. But even if such possession had been adverse, it was at an end when she died, and, during her lifetime, it could have created nothing more than a defensive right, which would not pass to a devisee under her will or descend to an heir. The bill will, therefore, be dismissed at the costs of the complainant."

The proof tends to show, and its weight does show, in our opinion, that the idea of the parties in making the assignment or survey of the thirty-six acres off to her was in surrendering her homestead and dower rights the widow she was to have a child's share in the whole tract, and, under this view the thirty-six acres, one-fourth of the tract was surveyed off to her. This view of the matter is rather forcibly impressed upon us by the actual conduct of the son and mother immediately after the survey and practically thereafter until the death of the mother.

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In the first place, he rented the thirty-six acres from his mother for two or three years after the survey of it, and that she took charge of it. In the second place, he built a residence for himself on the remaining 108 acres and lived thereon, separate and apart from his mother. While the proof is meager and unsatisfactory respecting a coolness or estrangement having arisen between the son and mother, the fact is, that after the survey, the mother went to live in the home of her daughter, Mrs. Empson, and lived in her home about six years, visiting according as she desired her other children.

At the end of this six years when she ceased to make her home with her daughter, Mrs. Empson, she went to the home of her daughter, Mrs. Covington, and made her home with her for about twelve years, or until March, 1910, when she went to the home of her son, where she died in August, 1910. There is evidence tending to show that the old lady was not entirely happy or satisfied, at least on occasions, while living in the home of the daughter and her son-in-law, Mr. and Mrs. Covington. The proof, however, wholly fails to convince us that she was subjected to any mistreatment or neglect by those parties while living in their home. It is apparent, we think, from the sensible evidence in the record, that the old lady, in the latter years of her life, was a sufferer from rheumatism, and this, coupled with her age, made her at times querulous and rather hard to please.

The proof of one party to the effect that the old lady said when she went to the home of her son in March, 1910, that she would rather crawl into the woods and starve than to return to the home of the Covingtons, and that she was afraid to stay at their house and afraid to leave there, hardly comports with the actual course of her conduct covering a period of about twelve years. She, in fact,

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lived there for the period stated. She rented the thirty-six acres to her grandson, the son of her daughter, Mrs. Covington. She visited, according to the proof, during this period, her other daughter and her son, went to church, and visited to some extent in the neighborhood. Her son, according to his testimony, stood ready at all times to give her a home and protection. In addition, she made her will involved here January 17, 1902. It is regular in form and is witnessed by two witnesses. In the second clause she gives to her son all beds and bed clothes and other things that were at his house at her death. In the third, she gave to her daughter, Mrs. Empson, all beds and clothing and other articles in her possession when she died. In the fourth she makes a similar gift to her daughter, Mrs. Covington.

The fifth and last clause of the will is:

"I will that my funeral expenses be paid *out of my thirty-six acres of land*. The remainder of said land I will to my daughter, D. A. Covington, in consideration of her kindness to me in my last feeble years of life."

There is no serious pretense in the evidence that this old lady was of unsound mind or irresponsible, or even averse to having her own way in matters that concerned her. It is quite obvious that when she executed her will she believed the thirty-six acres belonged to her to dispose of as she pleased. There is no reasonable ground to infer from the evidence that she was in any way coerced or unduly influenced to make it or that she was misled by the Covingtons into the belief that she owned, absolutely, the thirty-six acres. As a matter of fact, she so believed from the time it was surveyed off from the remainder of the tract. It is true there is proof in the record to the effect that Mr. Covington manifested a pretty strong desire for the old lady to fix things so he could get pay for

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his keep of her, and the desire on his part occasioned a day or more separation between him and his wife.

After a careful review of the record, we fail to discover any evidence at all, that the son took any step or said or did anything to disabuse her mind of the belief that she was the absolute and unconditional owner of this thirty-six acres in fee. Indeed, there is strong inferential evidence in the conduct of the son himself, that he suspected, if he did not know, that his mother was claiming to own, or might claim to own, in fee, this parcel of land.

A significant fact, to our mind, in this connection, proven by the son himself, is, that, after the thirty-six acres were surveyed off—just how long after, the record does not disclose—he consulted a justice of the peace, and, not satisfied with his opinion, went to Springfield and consulted General Garner, an old and distinguished member of the bar of that city, as to whether the survey and the control of the thirty-six acres of his mother would interfere with his right to the parcel upon her death.

During all this time, according to his testimony, the relations existing between him and his mother were intimate and exceedingly friendly, she often visiting his home during this period, remaining on occasions several days and nights, and yet, so far as disclosed by the record, he never mentioned the matter to her, nor sought an expression from her as to her belief as to the right and title under which she was holding and controlling the parcel of land.

If he did not know that she was claiming the parcel absolutely, or in fee, why consult a lawyer? Why did he not, instead, go to his mother, or ask her, when on visits to his home, in view of his filial duty and of their affectionate relations to which he testifies, as to the basis upon which she was claiming and controlling the parcel?

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Another significant fact appearing in the record is this: January 30, 1889, the son sold T. J. McMurry for \$225 twenty-five acres out of the 144 acres. The son, his wife, and his mother joined in the deed. This was before the survey of the thirty-six acres for the mother, which was made January 4, 1893. January 16, 1893, twelve days after the survey of the thirty-six acres to the mother, the son sold eight acres out of the 108 acres of the whole tract remaining to R. W. Covington for \$100. The mother was not asked to, and did not, sign the deed to this eight acres.

Another piece of evidence, in this connection, is this: In the survey of the thirty-six acres, its boundaries included a box barn which the son claimed. He demanded pay for it, and received it, giving the following receipt:

“January the 23d, 1903. Received of L. T. McMurry (this is the mother) fifty-nine dollars and sixty cents for said box barn, that I did claim. T. J. McMURRY.”

This was over ten years after the thirty-six acres were surveyed off to the mother.

Again, it is proven that the son, some three or four years after the mother came to the home of complainants to live, went to their home and offered his mother, so testified Mrs. D. A. Covington and her son, R. N. Covington, and her husband, R. W. Covington, \$500 for the thirty-six acres. R. R. and R. W. Covington testifying that he came and told his mother that he would give her \$500 in cash for her “damned little old place.” This, from some of the proof, was a full and fair price at the time for the thirty-six acres in fee.

The son, in his testimony, says that he told his mother that he would give her \$400 in money, if she would let him sell it. He further testified that he then had a deal

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on hand with Willie Boyles, who offered him a thousand dollars for the thirty-six acres.

R. H. Tate, fifty-six years of age, testified that he had known T. J. McMurry nearly all the life of the latter; that in 1893 he lived within a quarter of a mile of him; that he married a sister of Mrs. L. T. McMurry; that he had a conversation with T. J. McMurry, near or about the time the thirty-six acres was surveyed off to the mother of T. J., in which he told witness that he had that laid off for his mother, and he took the balance for himself, and called the thirty-six acres his mother's part of the land.

R. W. Covington, in rebuttal, testified that at the time he purchased the eight acres from T. J. McMurry he discussed with him the necessity or propriety of his mother signing the deed with him, and he replied that it was not necessary for his mother to sign the deed; that she had no interest whatever in what was left, after she took the thirty-six acres; that that was hers, and the remainder belonged to him, and that he had a right to do with it as he pleased, and she had the same right as to the thirty-six acres.

T. J. McMurry testified that there was no agreement at the time of his purchase of the undivided interest as to his supporting his mother for life.

In his testimony relative to his purchase of the interest of Mrs. Empson, he said: "I told 'Tommy' she could have a living out of the place as long as she lived," and being asked if he agreed with Empson and wife, as a part of the consideration for her interest in the land, he would take care of, support and care for his mother during her life, replied: "I don't think I did." Both of his sisters testified that he did so agree.

The thirty-six acres surveyed off to the mother is exactly one-fourth of the 144-acre tract left by the father of

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these parties. These questions were put to T. J. McMurry on his cross examination:

"Q. Now, don't you know that there being three of you children with her made four shares in the farm, and that the thirty-six acres were given her, absolutely, as her interest or child's part, as it was called, and known in the family; don't you know this is true?

"A. She never said nothing about that to me at all.

"Q. On the trial before the justice of the peace at Cross Plains, between B. A. Covington and Boyles, didn't you state that you didn't know what interest your mother had in said thirty-six acres, whether it was a homestead, or dower, life time interest, or a child part?

"A. Why, I think so."

There are other circumstances, slight, it may be, which, coupled with the foregoing, clearly sustains, in our opinion, the finding of facts made by the learned Chancellor, that "more than seven years before her death, Mrs. L. T. McMurry and defendant T. J. McMurry agreed in parol for a division of said land, she relinquishing to him her right in the 108 acres, and he agreeing to convey to her thirty-six acres in fee." As a matter of fact, this agreement was made about seventeen years before the death of Mrs. L. T. McMurry, and, as before stated, she exercised complete and undivided control over the parcel during all this time, and a little over eight years before her death she devised it by will as if she owned it in fee. If it be assumed, as found by the Chancellor, and as we find under the proof, that T. J. McMurry, when the thirty-six acres were surveyed off to his mother, agreed in parol for a division of the tract, and agreed to convey to his mother the thirty-six acres in fee, invested her with the fee, *as to him*, then the agreement for the partition need not have been in writing, as between them, because a

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partition of the land between parties entitled to it is not a sale of the land, and not obnoxious to the statute of frauds, and neither need it be registered under our registration laws. *Meachem v. Meachem*, 91 Tenn. (7 Pick.), 532.

Under the finding made by the Chancellor and our findings hereinbefore stated, we think it is entirely clear, under the great weight of authority, that in a contest between T. J. McMurry and his mother, the former would be estopped to deny the title in fee of the latter to the thirty-six acres of land in controversy.

Under the old common law, estoppels cut but little figure in the administration of rights, being limited, as a general proposition, to those arising from deeds or records of Courts.

This old rule of the common law was found in many instances to be an obstacle to the administration of manifest justice between parties, and Courts of Equity called into existence the doctrine of equitable estoppel, or estoppel *in pais*. While this equitable estoppel had its origin in Courts of Equity, it is now, generally speaking, applied in Courts of law, being no longer regarded as a technical rule of evidence, but as a substantial part of the law for the enforcement of rights and duties. *Savings Bank v. Ford*, 71 Am. Dec., 66; *Mills v. Graves*, 87 Am. Dec., 314; *Martin v. R. R. Co.*, 83 Me., 104; *Barnard v. Seminary*, 49 Mich., 444; *Kirk v. Hamilton*, 102 U. S., 77.

Mr. Stephens, in his work on Pleadings, 219, thus defines an estoppel:

"A preclusion in law which prevents a man from alleging or denying a previous fact, in consequence of his own previous act, allegations, or denial of a contrary tenor." *Russell v. Colyar*, 4 Heis., 193.

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Stated in another form, estoppels mean that a man for the sake of good faith and fair dealing should be estopped from saying that to be false, which, by its means, has been accredited for the truth, when by his representations he has led others to act. Herman on Estoppel; *Caruthers v. Crockett*, 3 Shan. Cas., 628.

As said by an eminent jurist:

"When a fact has been admitted or asserted for the purpose of influencing the conduct, or deriving a benefit from another, so that it cannot be denied without a breach of good faith, the law enforces the rule of good conduct or morals, as a rule of policy and precludes the party from repudiating his representations." *Ruffin v. Johnson*, 5 Heis., 604-609; *Russell v. Colyar*, 4 Heis., *supra*; *Wattman v. Lyons*, 9 Lea, 566; *Allen v. Westbrook*, 16 Lea, 566-71; 1 Green on Ev., Sec. 27.

The foundation of the doctrine of estoppel is the obligation resting upon every man to speak and act according to the truth of the case, the policy of the law being to suppress the mischief which would arise from destroying all confidence in the intercourse and dealings of men, if they were allowed to deny that which by their solemn and deliberate acts they have declared to be true. *Hamilton v. Zimmerman*, 5 Sneed, 40; *McLemore v. R. R. Co.*, 111 Tenn., 639-66; *Smith v. Memphis, Etc., Bank.*, 115 Tenn., 12-34; *Ruffin v. Johnson*, 5 Heis., *supra*.

Under later decision equitable estoppel or estoppel *in pais*, has been given a broader range than formerly. *Deckard v. Blanton*, 3 Sneed, 373-375.

And it has been said by our Supreme Court, it is a growing branch of the law, and for this reason decided cases are of less value than formerly, as every case must depend upon its own peculiar facts and circumstances. *Hume v. Banks*, 9 Lea, 728-748.

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It is now settled contrary, perhaps, to the ancient rule of the common law, that a person may be estopped by matter *in pais* as well as by record or by deed. *Parkham v. Turbeville*, 1 Swan, 437-439.

"Equitable estoppel," said Prof. Pomeroy and our Supreme Court, "in the modern sense, arises from the conduct of the party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, *and his silence* or *negative omission* to do anything." 2 Pom. Eq. Sec. 802; *Evans v. Belmont Land Co.*, 92 Tenn., 348-365.

Greenleaf on Evidence, Vol. 1, Sec. 207, thus states the doctrine, which has been approved in numerous cases by our Supreme Court.

"Admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself, or implied from the *open and general conduct of the party*; for, in the latter case, the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it. In such case, the party is estopped on grounds of public policy and good faith from repudiating his own representations. *Meriwether v. Lamon*, 3 Sneed, 452; *Brazelton v. Brooks*, 2 Head., 194; *Smith v. Bank*, 3 Hum., 220; *Chaster v. Greer*, 5 Hum., 25; *Phillips v. Hollister*, 2 Cold., 269; *Fields v. Carney*, 4 Bax., 137; *Rosenplanter v. Toof*, 99 Tenn., 92; *Electric Light Co. v. Gas Co.*, 99 Tenn., 371.

The doctrine may be thus stated, that where a party, by words or conduct, causes another to believe in the existence of a certain state of things and to act under that belief, altering his previous position, the former will be

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denied the right to aver against the latter a different state of things as existing at the same time. *Baird v. Vaughn*, 3 Shan. Cas., 216; *Smith v. Carmack* (Ch. Ap.), 64 S. W., 372.

The doctrine of Equitable estoppel is founded in natural justice and good conscience, and, say our Supreme Court, "is a principle of good morals as well as of law." *Evans v. Belmont Land Co.*, 99 Tenn., *supra*; *Electric Light Co. v. Gas Co.*, 99 Tenn., *supra*.

"The vital principle," said the Supreme Court of the United States, "is that he, who by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted."

"Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." *Dickerson v. Cosgrove*, 100 U. S., 580.

Again says that high Court:

"What I induce my neighbor to regard as true is the truth between us. If he has been misled by my asseveration, and we may add by words or conduct, he is estopped." *Kirk v. Hamilton*, 102 U. S., 76; *Electric Light Co. v. Gas Co.*, 99 Tenn., *supra*.

To the same effect is *Railway v. McReynolds*, Chy. App., 48 S. W., 258, and *Bloomstein v. ———*, 3 Cooper's Chy., 433-440, and quite a number of other cases.

Intentional or willful fraud is not in all cases an essential element or fact in order to afford a ground for the application of the doctrine of equitable estoppel, and, hence, it cannot be said, as an absolute and unconditional rule, that where the element of fraud is absent there is no estoppel. *Hume v. Bank*, 9 Lea, 72, 74; *Galbraith v. Lunsford*, 87 Tenn., 88-108.

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The apparent confusion to be found in some of the authorities on the subject, as said, in effect by Prof. Pomeroy and also by our Supreme Court in the case of *Galbraith v. Lunsford, supra*, arises, doubtless, from the fact that the fraud referred to had its origin in the effort afterwards to set up rights contrary to the conduct of the party, although at the time of the act constituting the estoppel there was the most perfect good faith.

Mr. Pomeroy says the term fraud as used in such cases is virtually synonymous with "unconscientious" or "inequitable."

"It is in this sense," said our Supreme Court, "that it is a fraud, or fraudulent, to attempt to repudiate the conduct which has induced the other party to act, and upon which the estoppel is predicated; but it is entirely another thing to say that the conduct itself, the acts, words or silence of the party constituting the estoppel must be an actual fraud done with the then intention to deceive."

"It may, therefore," continued the opinion, "be safely said, although fraud may be, and often is, an ingredient in the conduct of the party estopped, it is not an essential element, if the word is used in its commonly accepted sense, and the use of the word is unnecessary and often improper, unless applied to the effort of the party estopped to repudiate his conduct and to assert a right or claim in contravention thereof."

So, in the case at bar it may be conceded in deciding it, that the son, T. J. McMurry, when the thirty-six acres of land was surveyed off to his mother and she relinquished her right to the usufruct of the remaining 108 acres of the tract, and he agreed, as found by the Chancellor, to convey the thirty-six acres in fee to her, he acted in good faith and with no intent at the time to refuse to carry out the agreement; and if this be so, it is manifest that, as between them

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he would have been estopped from repudiating the agreement and holding on to the 108 acres. A Court of Equity, following the plain everyday principles of equity and fair dealing would have compelled him to carry out his agreement. It could have worked out this equitable result by decreeing that he held the title in fee to the thirty-six acres in trust for his mother.

In *Hanks v. Folsom*, 11 Lea, 553, when Judge Cooper concluding his opinion, page 53, uses this language:

"It would be manifestly inequitable to give them (in this case T. J. McMurry the life usufruct of the 108 acres belonging to his mother) both tracts of land, and it is not easy to see how they (T. J. McMurry in this case) can do equity after having sold the tract received by them;" in this case after T. J. McMurry had sold the life interest, or parts of it, of the mother in the 108 acres.

But aside from the principle of equity impressing the title in fee to the thirty-six acres in the lands of the son with a trust in favor of the mother, the title in fee to the parcel may be decreed in equity to have been in the mother and this without resorting to any statute of limitation.

We take it to be the law that the title to land may be divested and vested under the application of the doctrine of equitable estoppel, or estoppel *in pais*.

Beach on Modern Equity Jurisprudence thus states the rule:

"The fact that real estate is effected does not prevent the application of the doctrine of equitable estoppel. The authorities establish the doctrine that the owner of real estate may, by an act, *in pais*, preclude himself from asserting his legal title; and where this principle is applied to real estate, it is as effective as a deed would be from the party estopped." Beach on Mod. Eq. Jus., p. —, Vol. 2, Sec. 1113.

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The above was quoted with approval by Judge Lurton in the opinion in the case of *Evans v. Belmont Land Co.*, 92 Tenn. (8 Pick.), 364.

While it is true, as held by the authorities, that the owner of land may, by acts *in pais*, preclude himself by asserting his legal title, the doctrine should be cautiously or sparingly applied, and only upon clear grounds of justice and equity, and this, because it is opposed to the letter of the statute of frauds, and would render titles insecure if they were allowed to be effected by parol evidence of light and doubtful character." 2 Pom. Eq. Sec. 801.

In the following section, 802, the author uses this language, quoted with approval by Judge Lurton in the case above cited:

"Equitable estoppel, in the modern sense, arises from the conduct of the party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or omission to do anything. Its foundation is justice and good conscience; its object is to prevent the unconscientious and inequitable assertion or enforcement of claims, or rights which might have existed or been enforceable by other of law unless prevented by an estoppel, and its practical effect is from motives of equity and fair dealing, to *create and vest* opposing rights in the party who obtain the benefit of this estoppel."

See also to the same, in legal effect: *Terrell v. Wymouth*, 35 Am. St. Rep., 100; note and cases cited.

An estoppel is personal to the parties bound, and their privies. *Hillman v. Moore*, 3 Cooper, Chapter 454-459.

In other words, as we understand the rule announced by our Supreme Court, where a person claims under one bound by an estoppel, he is himself bound by the same estoppel. *Boyston v. Wear*, 3 Head, 8; *Heiskell v. Cobb*,

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11 Heis., 628-645; *Woolridge v. Boyd*, 13 Lea, 151; *Nelson v. Claybrook*, Lea, 687; *Kerbrough v. Vance*, 6 Bax., 110-113.

If correct in this statement of the rule, it follows that if T. J. McMurry was bound by estoppel as we have held he was, and is, and thereby being precluded by the estoppel from asserting his legal title to the thirty-six acres of land, his privy in estate, his co-defendant, J. W. Boyles, the purchasers of the thirty-six acres from him, is also bound by the estoppel and precluded from asserting title to the parcel under the deed of T. J. McMurry.

This proposition, if sustained, settles the case, and results in a reversal of the decree of the Chancellor.

It may be under the law that the claim of defendant Boyles, under his deed from T. J. McMurry would fail on the ground that this deed is champertous and void under our statute. Code, Shannon, Secs. 3171, 3172.

Boyles is first cousin of Mrs. T. J. McMurry.

He and said McMurry knew that the old lady McMurry had been in actual possession of the thirty-six acres of land for about seventeen years up to her death, either in person or by her tenant. Her tenant was in possession at her death, and McMurry sold and deeded the parcel to him in a few days after the death of the old lady. It was, according to their proof, a cash transaction. The suggestion naturally arises from this record, that T. J. McMurry knew, or suspected, that his mother had done something, or had taken some step, that would interpose some obstacle in the way of his claiming or getting possession of the parcel of land, and he, hurriedly, after the death of his mother, sells it for cash to the cousin of his wife, and this conduct suggests that it was for the purpose of putting between himself and an adverse claimant, a supposed innocent purchaser.

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But if the equitable title was in the old lady, with the right in her, in equity, to compel her son, T. J., to make a deed to her in fee in accordance with the agreement when the thirty-six acres was surveyed off to her and she relinquished to him her life estate of the 108 acres in consideration of the title in fee to the thirty-six acres, this title and right passed to the devisee of the old lady under her will and the devisee by her son was in possession at the death of the old lady, and when the deed was made to Boyles, and the sale by T. J. McMurry and the purchase by Boyles, come squarely under the chaperty statute.

Of course, if the old lady's right expired at her death, the statute against champerty and maintenance is out of the case.

The decree of the Chancellor is reversed and a decree will be entered here in accordance with this opinion, and the cause will be remanded to the Chancery Court of Robertson County for the settlement of the rights of the parties in accord with the opinion of this Court.

The costs, so far accrued, will be paid by the defendants.

ON PETITION TO REHEAR.

In this case we are presented with an earnest and able petition by defendants to rehear this case and reverse the decree heretofore entered by us in it, and to affirm the decree of the Chancellor.

Doubtless, petitioners feel aggrieved by the result reached by us in deciding it, and we think it may be safely said that complainants would have been equally aggrieved if we had decided in accordance with the contention of petitioners.

We gave this case the most thorough examination and consideration of which we were capable, reading and

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analyzing the evidence directly bearing upon the controverted, controlling facts more than once.

The Chancellor found, as a fact, that Mrs. L. T. McMurry and her son, petitioner T. J. McMurry, more than seven years before the death of the former, agreed in parol to a division of the farm left by her husband and his father, she relinquishing her right in 108 acres of it, and he agreeing to convey the remainder of the farm, thirty-six acres, to her in fee, but that this agreement was not reduced to writing.

No appeal was taken from this finding of a central fact by the Chancellor, and no complaint, in any legal form, was lodged against it, as we remember, at the hearing before us. But independent of the evidence as stated in our opinion, and as we find again, after another review of the evidence, it sustains the finding of the Chancellor.

The learned Chancellor reached his conclusion and rested his decree upon the proposition that there being no written memorandum of the partition or of the agreement on the part of the son to convey the fee in thirty-six acres to his mother, the statute of frauds interposed a complete defense to the claim of complainants.

In our opinion, for the reasons, and upon the grounds stated in it, we could not assent to this conclusion of the learned Chancellor. It is urged by petitioners in their petition for a rehearing that the doctrine of equitable estoppel was not relied upon by complainants in their pleadings. We think petitioners and their able counsel are mistaken in this. After stating rather voluminously, facts, complainants use this specific language in their bill:

"Complainants, therefore, plead, allege and charge that the defendants, McMurry and Boyles (the defendant Boyles claiming as he does) through and under the deed of defendant McMurry, are estopped to now, and at this

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late day, to call in question or dispute the title of the said Mrs. L. T. McMurry, or those claiming under her the said thirty-six acres of land."

We are of the opinion that counsel of petitioners are mistaken in their contention, that this is an ejectment suit, and if we are correct in this, the case was properly appealed to this Court, and this Court was invested with jurisdiction to dispose of it.

We have treated this petition to rehear as if it were filed in time under the rule of the Court, in view of the affidavit of counsel of petitioners.

According to their affidavit, the record, with the opinion of this Court, was furnished counsel of petitioners November 15, 1913.

The petition was filed December 6, 1913, more than ten days after the record and opinion of the Court were furnished counsel.

But, as before stated, we have again examined the record. We must confess that the petition presents no question or phase of the case under the evidence, not fully considered by us in preparing our opinion in the case. We think we applied the correct law to the controlling and determinative facts.

The petition to rehear is disallowed and dismissed with cost.

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E. T. & W. N. RAILWAY COMPANY v. H. W. GREGG.

Writ of certiorari denied by the Supreme Court.
(*Knorville.*)

1. JURISDICTION OF JUSTICE OF THE PEACE. *Action for penalty.*

Justices of the peace have no jurisdiction of suits brought to collect the penalty of \$100.00 denounced by sections 3070, 3072, Shannon's Code, against railroads for failure of their servants to call out the name of the station and the length of time of stopping of train at an approaching station.

2. RIGHT TO RECOVER PENALTIES. *Semble.*

It seems to be the law that only those who are inconvenienced by the failure of a railway company to comply with the above statutes may sue for the prescribed penalty.

FROM CARTER COUNTY.

Appeal in error from the Circuit Court of Carter County. W. T. COLEMAN, Special Judge.

JOHN H. TIPTON for Plaintiff in Error.

EPPS & YOUNG and LEE F. MILLER for Defendant in Error.

MR. JUSTICE WILSON delivered the opinion of the Court.

THIS suit was commenced by Mr. Gregg against the railroad company before a justice of the peace, January 1, 1908, to recover a penalty of \$100, on the ground that

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the railroad company, in violation of the statute of this State, failed to call out the stations of Hampton, Blevins, Pardee Point and Valley Forge, in its coaches of passengers, and at time its train would stop at said stations, as provided by law, on December 26, 1908, it being its east-bound passenger train running between Cranberry, N. C., and Johnson City, Tenn., and the train leaving Johnson City at 9 o'clock A.M.

The case was tried before a justice of the peace, and was appealed by the railroad company to the Circuit Court. It was tried twice in the Circuit Court, and on the first trial there was a hung jury. It was tried the second time in the Circuit Court before a jury in October, 1909, and resulted in a verdict against the company for \$100.

We should have stated that the railroad company moved the Court, at the conclusion of the evidence of plaintiff below and also at the conclusion of all the evidence, to direct the jury to return a verdict in its favor, which motion was overruled, and to which action of the Court is excepted.

It moved for a new trial in the lower Court, stating some eight grounds, which motion was overruled, and it appealed in error to this Court.

It assigns eight errors. The first, in substance, is, That the trial Judge erred in refusing to instruct the jury to return a verdict in its favor.

The second is that the Court erred in charging the jury as follows: "If you find that the plaintiff was a *bona fide* passenger on the train at the time, and if you find that they failed to call the stations and announce the time of stopping at any of these stations, and if you find further that it was a station where the train stopped to take on and let off passengers, then your verdict should be for the plaintiff."

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The third is that the Court erred in charging the jury that the penalty provided for it, section 3072, is recoverable by anyone suing therefor.

The fourth is that the Court erred in charging the jury as follows: "If you find by a preponderance of the evidence that the defendant railroad company, or its employes, failed to call the stations at the points named in the warrant, then your verdict should be for the plaintiff."

The fifth is that the Court erred in the following part of his charge: "Neither does it (section 3070) apply to stations except where trains stop for the purpose of taking on or letting off passengers."

The sixth is that the Court erred in refusing to charge the following special request of the railroad company: "The statute is only remedial and not punitive. It is not to be strictly construed. It could not mean, therefore, that the calls provided for should be made when there are no passengers on the train, or if there were no passengers in any coach—or that it should be called at a station where no passengers were to get off. There is nothing in the statute that in so many words gives the right of action to a common informer, and the argument of the Supreme Court is strongly persuasive, especially in view of the penalty that the right is only given to a party aggrieved. Therefore, I charge you that unless the plaintiff was in some way inconvenienced or aggrieved, he could not recover. I further charge you that it is not a violation of the law not to call a station which is a flag station. I further charge you that the failure to call the time the train was going to stop would not make the defendant guilty, unless there were some persons inconvenienced or aggrieved."

The seventh is that the Court erred in not holding that the Act of 1865-6, chapter 15, sections 2 and 4, as carried

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into Shannon's compilation of the laws of Tennessee, under sections 3070 and 3072, are unconstitutional and void, because violative of sections 16, 20 and 21 of Article I, and of section 8 or Article II, of the Constitution of the State of Tennessee, in that said Act imposes an excessive fine and inflicts unusual punishment; also in that no property shall be taken and applied to public use without just compensation being made therefor; also, in that the Legislature has no power to pass any law for the benefit of individuals inconsistent with the general laws of the land.

The eighth is that the Court erred in not granting the railroad company a new trial, because there was no evidence to support the verdict.

The decision of this case depends upon the proper construction of the Act of 1865, chapter 15, carried into the Code, Shannon, section 3070, which so far as need be stated is as follows:

"It shall be the duty of each conductor or other employe of any railroad in this State, to announce in loud, distinct words for each passenger car, the stopping place, station or depot, or town at which each car of passenger train stops, or shall be detained for any purpose, and also the time such car or passenger train will stop or be detained."

Section 3072 provides, that upon the failure of any railroad company doing any trip of the passenger cars, to comply strictly with any of the provisions of the section just quoted, it shall forfeit and pay \$100, recoverable before any Court having jurisdiction thereof, one-half to be paid to the person suing and the other half to go to the common school fund of the State.

Now, it appears that Mr. Gregg took passage upon the defendant in error railroad at Elizabethton, December 26, 1909. His destination was Cranberry, N. C.

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It appears that in conjunction with another gentleman he turned over a seat and had his feet on it. A brakeman came through the car, took his feet off of the seat, or requested him to take his seat, and turned the seat over and proceeded on his business.

He came back through the car in a short while, and found the seats turned facing each other with the feet of Mr. Gregg and the other gentleman on it.

While the evidence is not entirely clear as to the nature of the controversy that occurred between the brakeman and Mr. Gregg, it is quite clear and undisputed that they did get into a controversy, and that the brakeman again turned the seat so that the feet of the gentlemen could not be placed upon it. Thereupon, Mr. Gregg said in substance, that as the railroad company was particular in forcing its rules and regulations, he would see that they observed the rules and regulations prescribed by the statute, and called upon certain of the passengers in the coach to pay attention and see whether they called out the stations at which the train stopped, and the length of time it would stop at said stations.

The proof clearly shows that the train did stop at several stations, probably at Hempton, Blevins, Pardee Point, Valley Forge, and that these stations were not called out before the train reached them, nor was the length of time announced that the train would stop at said stations.

Mr. Gregg did not expect to stop at any of these stations and he testified that he was put to no inconvenience and was in no way aggrieved on account of failure to call out said stations or the time the train would stop at them.

He brings this suit, as above stated, to recover the penalty provided for in the section of the Code above quoted.

It is insisted by the railroad company that the Act of the Legislature involved is unconstitutional.

We do not think so.

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The statute was before our Supreme Court in the case of *Parks v. Railroad*, reported in 13 Lea, p. 1.

In that case suit was brought in the Circuit Court to recover the penalty prescribed in the statute, and the declaration contains 240 counts, alleging 240 violations of the statute.

The Supreme Court, it seems, was considerably divided upon the proper construction of the statute. However, the whole Court, as we understand their opinions, three having been delivered in the case, held the Act constitutional and that its enactment was the proper exercise of the police power.

The central question in this case going to its merits, is as to whether a passenger can sue for a violation of the statute unless he be aggrieved or inconvenienced in some way by a failure to observe it on the part of the railroad employes.

We infer from an examination of the three opinions in the case referred to, that the Court intended to hold and did hold that the party entitled to sue must not only be a *bona fide* passenger, but a passenger that was inconvenienced or aggrieved in some way by a failure on the part of the railroad company to observe the statute.

Judge Freeman delivered a strong dissenting opinion in that case, and the Court seemed to be considerably divided as to whether the statute was a remedial one or simply prescribed a penalty for the non-observance of its provisions.

If the view above stated that no one can sue for the penalty prescribed by the statute except a *bona fide* passenger who was inconvenienced or aggrieved in some way by a failure of the railroad company to observe it, then the judgment of the Court below must be reversed and the

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cause dismissed, and we are inclined to believe that the above view is the correct construction of the statute.

We are, however, of the opinion that this case must be reversed and the cause dismissed on the further grounds that the justice of the peace had no jurisdiction of the subject matter of this suit, and if this be, the judgment should be reversed and the cause dismissed, although the question was not raised by counsel in the case.

It was decided as far back as the case of *Duncan v. Wm. Maxey*, 5 Sneed, 114, that a justice of the peace has no jurisdiction of a suit to recover a penalty given by an Act unless the Act specially conferred such jurisdiction, and that in such an action it was not necessary to plea in abatement, and the want of jurisdiction appeared upon the face of the warrant.

The same principle was announced in the case of *Houser v. McKennon*, 1 Baxter, 287, and in the case of *Harris v. Hadden*, 7 Lea, 214.

We have been unable to find any statute conferring jurisdiction upon a justice of the peace to render judgment for the penalty prescribed by this statute.

If correct in this view, it follows that although no question was made in the Courts below as to the jurisdiction of the justice bringing this case, it is our duty to raise it and decide it here.

Upon the two grounds stated, and so far as the right is concerned upon the first ground stated going to the merits of the case, the judgment of the Court below must be reversed and the case dismissed, and it is so ordered.

Defendants in error will pay the costs of the cause, for which execution will issue.

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EUGENE GRIFFIN, BY NEXT FRIEND, JOHN S. GRIFFIN, v.
C. S. DICKERSON, ET AL.

Writ of certiorari denied by the Supreme Court.

(Nashville. December Term, 1913.)

1. NEGLIGENCE. *Knowingly permitting minor to play billiards, pool, etc., without written consent of parent, contrary to a statute, constitutes.*

It is negligence *per se* for any person engaged regularly, or otherwise, in keeping pool rooms or tables, etc., their employes, agents or servants, to knowingly permit any person under the age of twenty-one years to play at the games of billiards, pool, etc., without first having obtained the written consent of the father and mother of such minor, or other person having the legal custody thereof, or the principal of the school in which the minor is a pupil, in violation of Shannon's Code, section 6826, although such violation is not declared negligence by the statute.

2. CONTRIBUTORY NEGLIGENCE. *May exist though negligence per se because statute violated.*

The fact that one has been guilty of negligence *per se* in violating a statute does not relieve another from the duty to use due care for his own safety in connection with the same matter, and in not doing so he, notwithstanding the negligence of the other party, is guilty of contributory negligence.

3. SAME. *Minor chargeable therewith, when.*

A young man, seventeen years old, shown to be engaged in a mercantile business, will be presumed, as a matter of law, to have sufficient discretion to be guilty of contributory negligence, and will be charged therewith in a proper case.

4. SAME. *May be taken advantage of by demurrer, when.*

While contributory negligence is a defense, and the declaration need not aver its absence, yet where the declaration does aver

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facts showing the contributory negligence, defense may be made by demurrer.

FROM DAVIDSON COUNTY.

Appeal from the Circuit Court of Davidson County.
M. H. MEEKS, Judge.

JAMES T. MILLER for Plaintiff in Error.

S. N. HARWOOD for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

THIS case is before this Court on declaration and demurrer, the demurrer having been sustained and the suit dismissed by the Hon. M. H. Meeks, Judge, etc., in the Circuit Court of Davidson County, where the suit was brought. It results that questions of law only are involved.

Eugene Griffin, the real party plaintiff, the suit having been brought in his name by his father as his next friend, filed his declaration on December 18, 1912, alleging that at the time of the doing of the things complained of he was seventeen years of age; that defendants, C. S. Dickerson and Zac Carson, owned and operated a pool and billard hall in the city of Nashville, and that "on the — day of September, 1912, and at divers other times the defendants, their employes, agents, servants and other persons for them, knowingly permitted plaintiff, a person under the age of twenty-one years, to play on said tables at games of billiards, pool or other games requiring the use of balls, without first having obtained the written consent of the father and mother of plaintiff, both being then living," in violation of the laws of the State of Tennessee.

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It is then alleged that, "as a result of the wrongful and unlawful conduct of the defendants, their employes, agents, servants, and other persons for them, plaintiff, who was a boy, young and inexperienced, was led astray, his mind and attention diverted from his business to said games, his thought, time and energy taken, occupied and absorbed in the same, his development in a social and business way retarded, his progress in the mercantile business in which he was engaged impaired, his devotion to his duties and his obedience to his parents interfered with, and that he was greatly demoralized and injured by the things aforesaid; that the wrongful and unlawful acts and deeds of the defendants, their servants, agents, etc., was the direct and proximate cause of the injuries aforesaid; and that the plaintiff has been subjected to serious loss of time, heavy expenses in payment of said unlawful games, etc., in addition to the injuries aforesaid, wherefore defendants are indebted to plaintiff in the sum of one thousand dollars."

The law referred to in the declaration, and which it is alleged defendants violated, was enacted in 1883, being chapter 136 of the legislative enactments of that year. The first section of that chapter, as brought forward in Shannon's Code, section 6826, is as follows:

"It shall be unlawful for any person engaged regularly, or otherwise, in keeping billiard, bagatelle, or pool rooms or tables, their employes, agents, servants, or other persons for them, knowingly to permit any person under the age of twenty-one years to play on said tables at any game of billiards, bagatelle, pool, or other games requiring the use of cue and balls, without first having obtained the written consent of the father and mother of such minor, if living; if the father is dead, then the mother, guardian, or other person having legal control of such minor; or if

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the minor be in attendance as a student at some literary institution, then the written consent of the principal or person in charge of such school."

The remaining sections declare a violation of the first section a misdemeanor, punishable by fine, and make it the duty of the Judges of the State having criminal jurisdiction to give the provisions of the act in charge to the grand juries.

It will be observed that this statute is silent as to any right or remedy an individual might have who has been aggrieved as a result of its violation.

The demurrer to this declaration contains five counts, the first and second of which are in effect the same, and make the question that under the facts set out no cause of action is stated.

It has been repeatedly held in this State that when an obligation is imposed by statute it is negligence *per se* to disregard that obligation, and it is well settled that if injury is sustained by another as the direct result of such negligence the party disregarding the statute is liable for the damages consequent on the injuries, although the statute may have been silent as to such liability. Some of our cases so holding will now be examined.

The case in this State in which this question first arose was that of *Queen v. Dayton Coal & Iron Co.*, 11 Pickle, 458, 30 L. R. A., 82. In that case a boy ten years of age had been employed in a coal mine, contrary to a statutory provision prohibiting such employment of any boy under twelve years of age, but silent as to the effect of its violation on the question of negligence and the rights of those injured while so employed or as a result of the employment. While the boy was thus employed contrary to statute he was injured, and suit was brought against his employer to recover damages. The question of whether

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such act was within itself negligence or not, being then one of first impression in this State, the Court quoted freely from cases and text authorities, both as to whether the employment of the boy in violation of the statute was negligence *per se*, and as to the right to maintain the action for injuries flowing therefrom. Among the propositions quoted with approval is found the following from Wharton on Negligence, section 443:

"Where a statute requires an act to be done, or abstained from, by one person for the benefit of another, then an action lies, in the latter's favor, against the former for neglect in such act or abstinence, even though the statute gives no special remedy."

After quoting this and other propositions of similar purport, our Supreme Court proceeds as follows:

"So we think the employment of this minor, in violation of the provision of the statute in question, was an act of negligence on the part of the defendant, and, a causal connection between the employment and the injuries sustained by the boy being shown, a case of liability is made out. Of course, we do not hold that if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause wholly disconnected with his employment, the company would have been liable in damages, simply on account of the employment in violation of the statute. But we do hold that the breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment.

"This view of the case does not preclude the defense of contributory negligence on the part of the plaintiff. Says Mr. Bishop in his work on Noncontract Law, section 140: 'It suits the argument in many of the cases for the Judges to look upon disobedience to a legal command as

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an act of negligence. Thereupon, the doctrine of contributory negligence applies to the plaintiff, precluding his recovery in cases within its rule.'

"Says Mr. Thompson, Vol. II, page 1175, section 23: 'Statutes exacting special precautions on the part of owners of dangerous machinery are generally construed as not abrogating the ordinary rules of contributory negligence, etc. The effect of such statutes is simply to make the failure to comply with their requirement, negligence *per se* and not to excuse negligence in other persons. . .

"It is hardly necessary to add that contributory negligence on the part of a minor is to be measured by his age and his ability to discern and appreciate circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess."

Our next case in point is that of *Riden v. Grimm*, 13 Pickle, 220, 33 L. R. A., 587. In that case suit was brought by a wife against saloon keepers, alleging that they, in violation of a statute, had sold or furnished to her husband large quantities of intoxicating liquors, from the effect of drinking which he had become paralyzed and died; and she sought to recover damages. The trial Court sustained a demurrer to the declaration, and our Supreme Court overruled that action, holding that a cause of action was stated. The statute involved in that case was a peculiar one, making it unlawful for any one engaged in the manufacture or sale of intoxicants to "sell, give, furnish to, or procure for, *any husband* who is an habitual drunkard any intoxicating liquors, after having been served with a written prohibitory notice thereof, signed by the wife of the said husband;" and declaring a violation a misdemeanor punishable by fine. It is clear that under the

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holding of the Court the right of recovery was that of the wife and not of the husband. In other words, the suit was not one that could have been prosecuted by a personal representative of the husband, but the suit of the wife in her own right. The defendants, according to her allegations, had violated *her* rights as *wife* by furnishing intoxicants to her *husband* in violation of the statute. Under the holding of the Supreme Court of Alabama in *King v. Henkie*, 80 Ala., 509, 60 Am. Repts., 119, the action would not have been maintainable if brought by a husband for recovery for his own injuries, or had been brought by his administrator to recover damages for injuries inflicted on him.

Our next case is that of *Wise v. Morgan*, 17 Pickle, 273, 44 L. R. A., 548. In that case suit was brought by a father, as administrator of his deceased child, against druggists who had sold to his wife a poison without its being labeled "poison," as required by statute, and which the child had gotten from a mantel and a portion of which it drank, and had died from the effects thereof. The wife did not know that the medicine was poisonous, it not being labeled, as required by law. In disposing of that case, it was said:

"It is well settled that a failure to perform a statutory duty is negligence *per se*, and if the injury is the proximate result or consequence of the negligent act, there is liability. 2 Thomp. on Neg., p. 1232, section 5; *Queen v. Dayton Coal Co.*, 11 Pick., 458; 57 Am. Dec., 461.

"But it is insisted that the mother's negligence, in having the bottle accessible to the child, was such intervening negligence on the part of a responsible agent as broke the chain of causation, and became itself the juridical cause. This might be so if the mother had been aware of the poisonous character of the substance, but it is not

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claimed she had such knowledge, and her testimony is quite positive that she was ignorant of it. . . . Nor can the act of the child in getting down the mixture from the mantelpiece, and drinking it, be invoked as an intervening and independent juridical cause. The child was an irresponsible agent; it had not reached years of discretion, and negligence was not imputable to it. The case of *Meyer v. King*, 72 Miss. (S. C., 35 L. R. A., 474), cited by counsel for plaintiff in error, and other like cases, are easily distinguishable from this one, in the important feature that each presented an intervening, responsible agent that broke the chain of causation, so that the death could not be concatenated with the breach of the statute."

It will be observed that in distinguishing the Wise-Morgan case from the case of *Meyer v. King*, "and other like cases," there is no intimation that the Meyer-King case and other like cases are in any way unsound, the distinction being that in the class of cases referred to there was an intervening responsible agent that broke the chain of causation, the clear inference being that those cases, when properly applied, are sound.

We will now examine the case of *Meyer v. King* as it is reported in 35 L. R. A., 474. In that case a minor, whose age is not stated, but who, though spoken of as being of "tender years," it is disclosed, had been employed as a clerk in a grocery store at the time of the matters complained of, purchased chloroform from druggists and took it internally, from which he died. The chloroform was sold to him in violation of a statute. It was held by the Supreme Court of Mississippi that the action could not be maintained for the reason that the minor was guilty of contributory negligence in the taking of the poison. Another feature of that case applicable here is that the declaration was held to be demurrable, the declaration on its

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face showing the contributory negligence which consisted in voluntarily taking the poison. Relative to this last matter, it was said:

"It is true that contributory negligence is a defense, and the declaration need not aver its absence (*Hickman's Case*, 66 Miss., 154); but when, as here, the declaration on its face avers facts showing the contributory negligence, the defense by demurrer is then as perfect as the defense on the facts showing in evidence the contributory negligence would be later."

See also 1 *Southerland on Damages* (3d Ed.), section 38.

We also refer to a lengthy note found in 9 L. R. A. (N. S.), appended to the case of *Wolf v. Simth*, beginning on page 338. The note bears the caption, "PRIVATE ACTION FOR VIOLATION OF STATUTE NOT EXPRESSLY CONFERRING IT"; and after announcing on page 339 of the volume referred to that, "To disobey the positive command of a statute to the injury of the person or property of another always constitute negligence in fact, and is frequently negligence as a matter of law, affording the injured person an action whenever the other elements essential to a recovery unite," it is said on page 342, "In case the violation of a statute causes an injury, the offending party will be liable in damages to the injured one, as a general rule, only when the victim has been free from contributory negligence." Both of these propositions are supported by a vast array of cases from many jurisdictions; and they are both in line with the announcements of our Supreme Court in the cases we have herein reviewed. In fact, our attention has not been called to any authority to the contrary.

Now, applying these principles to the declaration in the instant case, we are of opinion the action of the lower

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Court was correct, and must be affirmed. A boy seventeen years of age must be presumed, according to all the authorities, to be of sufficient discretion to be guilty of contributory negligence ; and, in addition to the age, the declaration in the instant case discloses that he was engaged in a mercantile business, thus making a case of contributory negligence as strong as, or stronger than, that made in the case of *Meyer v. King, supra*. There is nothing in the declaration to negative this showing.

It is simply alleged that defendants knowingly permitted him to play at the games without first having obtained the written consent of his father and mother, and in violation of the law, without any character of allegation that any force or persuasion or influence whatever was used by defendants to induce him to play ; nor is it alleged, or intimated, that he did not know of the evil effects of his doing so, or that the defendants knew anything more about that than he knew. So we hold that, while defendants were guilty of negligence, taking the allegation of the declaration as true, as we must on demurrer, plaintiff's contributory negligence, or as some of the authorities express it, his act as an intervening cause, bars any recovery.

Of course, the result would be different if the statute it is alleged defendants violated had expressly made them liable in damages for their acts as does our statutes prescribing certain duties of railroads (Shan. Code, sections 1574, 1575), but such is not the case at bar.

The action of the lower Court is affirmed with costs.

Hampton v. Hancock.

JOHN S. HAMPTON, ET ALS. V. JEANIE HANCOCK.

Writ of certiorari denied by the Supreme Court.

(Jackson. April Term, 1914.)

1. **VENDOR AND VENDEE.** *Sales of realty. Liability of vendor for false or untrue representations.*

The seller of real estate is liable in damages to his vendee for material, false or untrue representations of fact respecting conditions of the land made during negotiations if the representations were relied upon by the purchaser and were an inducement.

2. **SAME.** *Statute of frauds.*

In such case the statute of frauds is no defense.

3. **SAME.** *Opportunity to inspect. . . . Reliance upon representations of vendor.*

A purchaser of real estate, although afforded an opportunity to inspect the premises, may rely upon the representations of the seller or his agent as to matters that are not obvious.

4. **SAME.** *Liability of vendor for misrepresentations of real estate agent.*

The vendor may be held liable for the misrepresentations of his agent as to matters of fact made during the negotiations if these misrepresentations were material and were relied upon by the vendee.

FROM SHELBY COUNTY.

Appealed from the Chancery Court of Shelby County,
Part 1. F. H. HEISKELL, Chancellor.

R. P. CARY and JOHN V. BREUGGE for Complainants.

G. T. FITZHUGH, JAMES L. DILLARD and BARTON &
BARTON for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the
Court.

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HAMPTON and wife filed this bill to recover from Mrs. Hancock the sum of \$291.10, claimed to be due as damages or extra expenditures occasioned by misrepresentation upon the part of Mrs. Hancock, through her agents, as to the condition of a lot bought by Hampton and wife from her in the city of Memphis. The Chancellor sustained the bill and decreed a recovery. Mrs. Hancock prayed an appeal and is here assigning errors.

The clear weight of the evidence introduced satisfactorily shows that Hampton and wife were desirous of buying a lot owned by Mrs. Hancock. They approached the real estate agency that had the property for sale and made inquiry and began negotiations, stating at the time that they did not desire to buy a filled lot, and that they wanted the lot in question for the purpose of erecting thereon a home, but would not consider the matter of buying if it were not solid earth. This agent expressed the opinion that the lot was not filled, but in order to know definitely whether it had this defect, he told Hampton and wife that he would make inquiry of a brother-in-law of Mrs. Hancock, who was her business representative or manager. This agent subsequently communicated to Hampton and wife the statement of this brother-in-law that if the lot had any fill at all other than a few inches of surface fill, it was in the rear of the lot and would not interfere with the building designs of the Hamptons. After these inquiries and representations the contract was closed through the representative, and this contract was subsequently executed by Mrs. Hancock. The Hamptons took possession, let out a building contract and the builder proceeded to the work of excavating for foundation and basement purposes. It was discovered by him that there was within the space to be occupied by the building a very deep fill, such as would necessitate the sinking of the foundation to

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a depth of four feet in excess of that originally contemplated, and that also the basement space would have to be much larger and more expensive than originally planned. He was ordered to do the additional work and to compute the added cost. This cost was something over \$400.00. Hampton and wife and the contractor reached the conclusion that the expenditure in excess of the original computation, lessened by the benefits that would accrue from the enlarged basement, was \$291.10; and for this sum the present suit was brought.

Several defenses to this claim are urged. It is stated that there was no provision in the written contract for indemnification against loss because of defective premises, and it was also urged that this was a part contract not in writing. Neither insistence is an answer to the demand of complainants. Complainants had the right to show that certain representations made during negotiations with respect to the condition of the lot upon which they relied were untrue, and to sue therefor if damage resulted: *Breast v. Waddell*, 2 Tenn. C. C. A., 544. There can be no doubt of the right of a vendee who relies upon such representations orally made to sue therefor: 40 Am. Dec., 314; 39 Cyc., 2084.

It is also insisted that Mrs. Hancock cannot be held liable because she did not make or authorize the making of any representation whatever as to the condition of the premises. This defense is unavailing. She cannot escape responsibility for the representations made by her real estate agent and her brother-in-law if they induced a contract which she subsequently ratified and consummated. Real estate seekers cannot be beguiled into purchases by the material misrepresentations of sales agents and told by owners upon making complaint that they, the owners, were not responsible for the loud and boastful assertions

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made by the agents during the stimulating of the purchasing desires of the customer. It is safer to hold vendors liable for the false or untrue representations of *matters of fact* made by brokers during negotiations. The rule laid down still leaves room in which these promoters of sales may puff and express extravagant opinions.

It is next urged that this was a mere matter of opinion upon the part of the representative of Mrs. Hancock and not the statement of any fact. This contention needs no answer, other than the recalling of the testimony to the effect that Hampton and wife did not want a filled lot, and were particular in their inquiry as to whether the lot in question was of such character.

It is urged that the Hamptons had the opportunity to examine this lot and afforded all the means of ascertaining its true condition, and that under the circumstances they should be held to have bought at their own hazard. The testimony is to the effect that they relied upon the representations of the agent, and the circumstances were such as justified them in so doing. They knew nothing about how the lot had been built up, and were certainly not afforded the means of excavating to find out whether there was a fill. Under such conditions a vendee has the right to rely upon the representation of his vendor as to conditions: *Bradbury v. Haynes*, 60 N. H., 123; *Schumacher v. Mather*, 133 N. Y., 590.

It is finally insisted that complainants suffered no loss by reason of this breach. We do not understand thoroughly how and why the Court adopted the measure of damages fixed by complainants as the exact amount that should be recovered. But be that as it may, the preponderance of the testimony is that the discovery of the fill occasioned a much greater expenditure upon the part of complainants than they originally contemplated, and

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the proof fails to show any reaping of advantages commensurate with the amount for which they sued. On the contrary, the preponderance is that complainants suffered a substantial loss because of the misrepresentations. The true measure of damages was the difference between the contract price and the market value of the lot with the fill upon it. Nothing of this kind is suggested by learned counsel for appellant and no effort made by her in the lower Court to show what this would be. We are inclined to the opinion that as complainants undoubtedly had the right to a substantial recovery, and were claiming \$291.10 as their measure of recovery, the defendant ought to have met this by some evidence respecting the correct measure of damages, but she neglected to do so. Another thing: she is not here with an assignment that the decree is excessive in amount. Again, the Court is impressed that a reference for an accounting would be long, tedious and expensive; and, besides, complainants introduced evidence tending to show that they had made reduction in the extra cost commensurate with the benefits accruing to them, and the Chancellor adopted their view. We have, therefore, reached the conclusion that no sufficient reason is given for the reversal or modification of the decree of the Chancellor.

We, in conclusion, remark that the brief and assignment of errors filed in this case by appellant are not in accordance with our rules, in that we are not referred to certain vital parts of the transcript, and that we could with propriety have disregarded them.

The decree of the Chancellor is in all things affirmed. Mrs. Hancock will pay the costs.

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BANK OF WOODBURY V. G. G. MITCHELL.

1. USURY. *Merger by judgment. Waiver.*

The maker of note upon which usurious interest has been paid cannot, after suit upon the note and rendition of judgment thereon, bring an independent action for the usury so paid. His plea of usury should have been interposed at time of original suit.

2. SAME. *Justice of peace. Jurisdiction.*

A justice of the peace has jurisdiction to entertain a plea of usury.

FROM CANNON COUNTY.

Appeal in error from the Circuit Court of Cannon County. JOHN E. RICHARDSON, Judge.

HOYT T. STEWART for Plaintiff in Error.

JOSH BARTON for Defendant in Error.

MR. JUSTICE WILSON delivered the opinion of the Court.

THIS case is before us upon an appeal of the defendant in error from the judgment of the Circuit Court of Cannon County, rendered June 18, 1912, in favor of defendant in error for \$29.50, which was ordered to be entered as a credit upon a judgment for about \$750.00 rendered by a justice of the peace against defendant in error, on the ground that said sum had been usurious interest paid to the bank by defendant in error.

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It appears that the case was heard before the Circuit Judge without the intervention of a jury upon the following agreed state of facts:

"That the defendant bank recovered a judgment in December, 1911, from Mitchell and against his sureties for \$725.00 before W. W. Sullivan, a justice of the peace for Cannon County, Tennessee, upon notes aggregating that sum as principal, all of said notes being some months past due, and that said judgment was stayed for all parties, principal and sureties. That of said judgment \$7.35 was usurious interest which had been included in the face of the notes. That in addition to the above sum of \$7.35, it is agreed that plaintiff Mitchell had paid to the bank in cash \$29.50, which was not included in the above judgment of the justice of the peace, but which was excessive interest paid on various renewals of the notes on which judgment of the justice was based.

That upon the trial of the cause before the justice of the peace, the defendant Mitchell did not enter a plea of usury and did not appear, and it was agreed that said judgment was regular in all respects.

It was further agreed that Mitchell brought suit against the defendant bank on the — day of February, 1912, to recover said above amount as usury paid the bank. That said suit was dismissed and appealed by Mitchell from the judgment of the justice. That on the trial of the cause before the justice, the bank pleaded the former judgment before the justice as set off and as *res adjudicata*. It was also agreed on the trial of the cause in the Circuit Court that the case was being tried on said pleas, and as upon a duly certified copy of the whole record in the cause from the justice's court.

It was further agreed that the judgment for \$725.00 before the justice of the peace had not been paid, and

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that the stay of execution thereon had not expired, and it was agreed that this was all the evidence in the cause.

The trial Judge as before stated, hearing the case on the appeal of Mitchell from the judgment of the justice on June 8, 1912, upon the foregoing agreed statement of facts, rendered a judgment in favor of Mitchell and against the bank for \$29.50 and the costs of the cause. His Honor, the trial Judge, further directed that the above judgment should be entered as a credit upon a judgment for about \$725.00 upon the docket of W. W. Sullivan, J. P., said judgment being unpaid and the above judgment being rendered for usurious interest upon the indebtedness upon which said judgment before the justice was founded, the judgment of the justice being rendered in the case of the *Bank of Woodbury v. G. G. Mitchell, et als.*

To the action of the trial Judge in rendering the aforesaid judgment, the Bank of Woodbury excepted and entered a motion for a new trial, which motion the Court overruled and the bank then moved the Court in arrest of judgment, and this motion was overruled, to which the bank excepted, and from the judgment of the Court and from its action upon its motions the bank prayed and was granted an appeal to this Court.

The error assigned, in substance, by the appellant bank, is that the trial Judge erred in rendering the judgment he did upon the ground in the main that Mitchell should have presented his plea of defense of usury paid before the justice of the peace.

We think this contention of the bank is correct. In brief, the bank held certain notes against Mitchell and on a day stated, it sued Mitchell and the sureties on his notes for the amount thereof. In the notes sued on was included usury that Mitchell had paid the bank on re-

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newal of the notes sued upon. He did not appear and the justice of the peace entered judgment upon the notes for the amount due thereon. The judgment rendered by the justice of the peace in favor of the bank against Mitchell and his sureties, was stayed by stayors for the benefit of all the judgment debtors.

Some two months after this judgment was rendered by the justice of the peace against him and his sureties, defendant in error brought this suit against the bank to recover usurious interest paid on the debt constituting the consideration of the judgment rendered by the bank.

As before indicated, Mitchell did not appear before the justice of the peace in the suit instituted against him to recover on these notes and, as before indicated, the justice of the peace rendered judgment against him and the sureties on his notes. Execution on this judgment was stayed. Some time thereafter, he brought this suit, to recover the alleged usurious interest entering into and forming a part of the judgment of the justice of the peace. His suit was dismissed and he appealed to the Circuit Court when the Circuit Judge rendered the judgment in his favor hereinbefore indicated.

The essential contention of the bank is that defendant in error, Mitchell, had his day in Court in the suit instituted against him before the justice of the peace, and that if he intended to interpose the defense of usury he should have made the same before the justice of the peace, and that having failed to do so, he cannot afterwards sue in an independent suit for the usury embraced in the judgment of the justice of the peace.

We think this insistence is well taken, and that it is supported by the authorities: Shannon's Code, section 3499; 5 Yer., 462, 463.

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The justice of the peace had jurisdiction to entertain the defense of usury in the suit brought by him.

If correct in these views, it follows that the judgment of the Court below is erroneous and must be reversed and the suit of defendant in error must be dismissed with costs, and it is so ordered.

J. J. McQUEEN v. WATAUGA COUNTY BANK.

Writ of certiorari denied by the Supreme Court.

(*Knoxville*. September Term, 1913.)

BILLS AND NOTES. *Acceptance by drawee. No necessity for, when. Agency of drawer. Estopped.*

A drawee of a series of drafts who has for years honored in the hands of third or remote parties drafts drawn by a certain party is estopped to deny the authority of the drawer, especially if drafts thus drawn have been permitted by the drawee before acceptance to circulate as money or negotiable instruments; and in such case it is unnecessary for the holder in due course of a draft so drawn to show acceptance by the drawee.

FROM JOHNSON COUNTY.

Appeal in error from the Circuit Court of Johnson County. **DANA HARMON**, Judge.

C. J. ST. JOHN for Plaintiff in Error.

LEE F. MILLER and **W. R. LOVILL** for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

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THE plaintiff in error, J. J. McQueen, is and was in 1912 a merchant and produce dealer at Butler, Johnson County, Tennessee. He had a branch store at Neva, Tennessee, said branch store being in charge of one L. J. Markland as manager. Markland was authorized to purchase poultry for McQueen at said branch store, as well as to conduct a general mercantile business, and to draw drafts on McQueen for poultry and goods purchased in the conduct of said business, and for the expenses incident to operating said business at Neva.

In drawing these drafts, Markland would sign his name to them as drawer, and they were payable at sight through the Johnson County Bank, at Butler, Tennessee, in which bank McQueen kept a deposit. These drafts were made payable to persons in whose favor they were drawn, respectively, and circulated in that locality like checks, being often indorsed by the payees to others, and upon being received at the Johnson County Bank, at which they were payable, they were paid without the same being presented to McQueen, and were charged to his account by the bank. The entire business of said branch store at Neva was conducted upon this system, and had been so conducted for several years prior to the transactions out of which the present litigation grew.

The undisputed evidence is that Markland issued drafts in this manner for all indebtedness contracted by him in the conduct of said branch store, such as the purchase of goods, merchandise, etc., and all of said drafts so issued had been paid by McQueen, through the Johnson County Bank, without any question being made upon them.

In the conduct of said business at Neva, Markland was in the habit of purchasing large quantities of produce from one C. C. Greer, and would draw drafts in favor of Greer on the plaintiff in error, McQueen, to pay for the same,

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and Greer would take said drafts to the defendant in error, Watauga County Bank, at Boone, North Carolina, where the same would be credited to his account as cash items, and he was permitted to check against the proceeds of said drafts. This was well known to the plaintiff in error. It appears that a considerable number of these drafts had been issued to Greer and handled in this manner by the Watauga County Bank, prior to the issuance of the two drafts involved in this litigation. These two drafts in question were drawn by Markland in favor of Greer on August 15 and 22, 1912, respectively, and were for \$250 each. They were not drawn for the payment of poultry or merchandise purchased by Markland in the conduct of said business, but were issued by Markland as advancements to Greer, who deposited them in the Watauga County Bank, and was credited by the bank to his account as cash items, and he was permitted to check against their proceeds, as had been his practice with other similar drafts issued by Markland.

McQueen, upon ascertaining that these drafts had been drawn by Markland in favor of Greer as advancements, refused to pay them, and said drafts were protested by the Johnson County Bank. At the time McQueen refused to pay them, Greer had checked all of their proceeds out of the Watauga County Bank, except \$77.26, which amount remained to his credit in said bank, and fled the country. The proof shows that Greer is totally insolvent.

McQueen having refused to pay said drafts, this suit was instituted against him by the Watauga County Bank, before a justice of the peace of Johnson County, to recover upon them.

A trial before the justice resulted in a judgment dismissing the plaintiff's suit. From this judgment it appealed to the Circuit Court of the county, where the case

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was tried before the Circuit Judge, without the intervention of a jury, who, after a hearing of the case, rendered judgment against the defendant McQueen for the full amount of said drafts, interest and protest fees, less the sum of \$77.26 remaining to Greer's credit in said bank, at the time said drafts were protested, said judgment aggregating the sum of \$448.26. From this judgment McQueen has appealed to this Court and assigns errors.

By the assignments of error it is insisted that there is no evidence to support the judgment. And, further, that the drafts were issued by Markland without authority, or, rather, that Markland exceeded his authority in the issuance of said drafts; that they were never accepted by the plaintiff in error, and he is not, therefore, liable for their payment.

The undisputed evidence is, that Markland had, as the agent of McQueen, drawn some three thousand of these drafts in favor of various persons during the period he had been in charge of said business at Neva, and during the months of July and August of the year in which the two drafts in question were drawn by him, he drew a number of other drafts on McQueen in favor of Greer, six of which were for similar amounts of \$250 each, and were deposited by Greer in the Watauga County Bank in the same way, and as cash items; and all of them were paid by the defendant McQueen without question. McQueen admits that he knew that these drafts circulated around over the county as checks; that he had been doing business in this way for four or five years, and knew that the Johnson County Bank at Butler charged these drafts to his account as checks, and he made no objection to said bank handling the drafts in this way. He also admits that he knew Greer was depositing the drafts, drawn in his favor by Markland, in the Watauga County Bank at

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Boone, to his credit, and that he was checking against their proceeds. He also admits that he knew that his agent, Markland, was drawing drafts in favor of Greer for money in excess of purchases of produce made of Greer, and that Greer was giving Markland checks on the Watauga County Bank for the difference, and that the Watauga County Bank had recently protested some of the checks given by Greer to Markland. McQueen says that he instructed Markland not to "build up" Greer's account, but does not know whether Markland followed his instructions strictly, and does not know whether the six drafts of \$250 each, which were issued prior to the two in question, were issued for produce purchased of Greer or not.

Markland testifies that Greer was a good produce buyer; that there was lively competition in the produce business in that locality; that Greer was turning over to him all the produce he (Greer) could buy, and that he (Markland) issued to him drafts for more than he purchased. Markland says he issued to Greer some eight or ten drafts for \$250 each prior to issuing the two drafts in question, and that all of them were paid by McQueen without question. McQueen says that a list of the drafts issued by Markland were furnished him twice a month, but that many of them were paid by the bank and charged to his account before he received the list from Markland.

It will be seen from the evidence that McQueen, for several years prior to the issuance of the drafts in question, had been permitting his agent at Neva to draw drafts on him for purchases made and expenses incurred in the conduct of his business at that place, which drafts were paid through the Johnson County Bank, and charged to his account, without his having formally accepted them, and, in many instances, without knowledge on his part of their issuance. In other words, these drafts passed

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currently as checks in the locality where they were issued. There is evidence tending to show that advances were made to Greer by Markland from time to time in excess of his purchases, with the full knowledge and consent of McQueen, and as a part of the course of dealing between them, and that McQueen knew that Greer was depositing these drafts in the Watauga County Bank to his credit, and was checking against them in making his purchases of poultry through the country. McQueen had paid many other similar drafts held by said bank, and the bank had the right, in view of its prior course of dealing with respect to these drafts, to assume that they would be paid in the same way, and that it could safely permit Greer to deposit and check against them.

In view of the foregoing facts, we are of opinion that Markland had implied authority to draw the two drafts in question, and that this implied authority existed by virtue of the previous acts of ratification or recognition on the part of McQueen of similar acts on the part of his agent, Markland. And in view of the fact that the drafts issued by Markland were universally treated as checks, and were paid through the Johnson County Bank and charged to McQueen's account, without his having formally accepted them, we think no formal acceptance by him was necessary to the proper payment of the two drafts in question.

Mr. Tiedeman, in his work on Commercial Paper, speaking with regard to the authority of agents, says:

"The authority of agents may also rest upon implication, and there may be three kinds of implied authority: First, implied from express authorities; second, from appointment to a particular office or clerkship by name; and, third, implied from previous ratifications or recognition of the agency." Section 76.

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Again, at section 79, the author says: "If a person has, in the capacity of an agent for another, repeatedly drawn or accepted bills, or executed promissory notes for him, whether with or without authority, and the supposed principal has recognized or ratified the act of the agent, by payment of the bill or note, or in any other way; the principal will be bound by any subsequent exercise of authority of a like character, on the ground of estoppel. By allowing the person to appear as a duly authorized agent, in honoring the bills and notes previously executed by him as agent, he is estopped from denying the authority of the agent as against persons who deal with the agent in reliance upon this evidence of authority."

"A ratification may be implied from the previous acts of the principal under similar circumstances. Thus, if, in consequence of a notorious agency, the agent is in the habit of drawing bills, which the principal has regularly paid, this is such an affirmance of his power to draw, that the principal will be bound to pay other bills, though the agent should misapply the money raised by such bills." *Clark & Skyles on Law of Agency*, Vol. 1, section 139.

To the same effect in *Cyc.*, Vol. 31, p. 1263.

It results that there is no error in the judgment of the Court below holding the defendant *McQueen* liable on said drafts, and it will be affirmed with costs.

State, Parkey, v. Carr.

STATE, EX REL., W. C. PARKEY, v. T. B. CARR, ET AL.

Affirmed by the Supreme Court.

(Knoxville. September Term, 1913.)

1. **ELECTION CONTEST.** *Chancery jurisdiction.*

A bill filed by a candidate at a general election to compel the election commissioners of a county to assemble or reassemble and canvass or recanvass the vote is not an election contest, although complainant prays that they be required to declare him elected and to issue him a certificate of election. Such suit may be brought in the Chancery Court.

2. **ELECTION COMMISSIONERS.** *Recounting the vote of a general election. Mandamus.*

Election commissioners of a county who have failed to canvass the returns of a general election may be compelled by a Court of competent jurisdiction to assemble and discharge the duty of canvassing the vote. And it will be no excuse that they have partial returns only, or that some of the returns have been altered, nor is it any defense that they had made a partial canvass and had abandoned the effort. It is their duty to canvass and certify the returns as best they can, or to make a statement of their reasons for an insufficient canvass.

3. **SAME.** *Resignation of commissioners.*

The resignation of commissioners of election after suit brought or after an election held by them and receipt by them of the returns of said election is no defense to a petition for a mandamus requiring them to assemble or reassemble and canvass or recanvass the returns.

FROM CLAIBORNE COUNTY.

Appealed from the Chancery Court of Claiborne County. HUGH KYLE, Chancellor.

State, Parkey, v. Carr.

JOHN P. DAVIS and L. D. SMITH for Complainant.

PAUL E. DEVINE for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THERE is in this case a multiplicity of questions which require much condensation. Complainant presents four different bills, the last three of which were filed as amendatory and supplemental to the original bill. Upon permission by the Chancellor to file the several bills they became in legal effect one bill and pleading: *Bank v. Bonner*, 1 Tenn. C. C. A., 443. Another rule is that all allegations of the subsequent bills are treated as incorporated with and parts of the original bill.

This controversy had its origin in the election of a trustee in Claiborne County at the August, 1912, election. At this election Parkey and defendant Sharp were rival candidates. This election took place on the first day of August. On the 3d of August succeeding, Parkey filed his original bill against Sharp and defendants Carr, Kivett and Ketron. The averments of the bill, which for clearness should be stated, were in substance that at the preceding election Parkey had been duly elected to the office of trustee and was entitled to the certificate of election, but that Carr and Kivett had fraudulently and illegally conspired for the purpose of robbing him of the fruits of the election by altering the face of the returns so as to show that Sharp was elected; that Carr and Kivett, as election commissioners of Claiborne County, had determined to control the election to the several offices of that county and had parceled them out, and that the reward to Carr for his participation in the conspiracy was the falsifying of returns so as to show that Sharp, his brother-in-law, was elected to the office of trustee. Many other

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averments not pertinent or necessary to be repeated here, were made in the bill. The chief prayer of this bill was that defendants, the election commissioners, be enjoined from in any manner altering the face of the returns or from throwing out or refusing to count any of the returns as they were certified by the election officers, and from issuing a certificate of election to Sharp, unless upon the face of the returns as certified by the election commissioners it be shown that he was elected; and on the other hand that said commissioners be enjoined and ordered, if the face of the returns showed that Parkey was elected, to issue a certificate to him.

An injunction substantially as prayed for in this bill was directed by Chancellor Will D. Wright to be issued.

On the 10th of August following a bill designated as an amended and supplemental bill was filed. To this bill General Vines, attorney-general of the judicial circuit in which Claiborne County is situated, annexed his signature and authorized its filing as a proceeding on behalf of the State of Tennessee on relation of Parkey. The averments of this bill, in addition to the repetition of the allegations of the original bill, were in brief that defendants Carr and Kivett were proceeding to carry out their fraudulent design of certifying to the election of Sharp, and had willfully refused to count the vote or proceed to canvass the returns, and had also refused their co-commissioner, Ketron, access to the returns or participation in the canvass. It was alleged that petitioners believed that Carr and Kivett had firmly resolved to certify to the election of Sharp and that they would not issue certificate to Parkey unless compelled to do so by order of the Court after a fair count of the returns. The prayer of this bill was, in substance, that it be filed as amendatory and supplementary to the original bill; that an alternative

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writ of mandamus issue, requiring the election commissioners to proceed to canvass the election returns as originally certified by the officers of election, and to issue to Parkey a certificate of election showing his election to the office of trustee or to show cause why they had not done so, and that Parkey be given a decree for damages. This pleading was presented to Chancellor Wright. He ordered that it be filed in the Chancery Court of Claiborne County as an amended and supplemental bill, and directed that alternative writ of mandamus issue and be served upon defendants, requiring them to appear before Chancellor Kyle at Rogersville, Tennessee, on August 24, 1912, and show cause why a peremptory writ of mandamus should not issue against them.

On the 31st day of August another bill, designated as an amended and supplemental bill, was filed by complainant Parkey. The new averments of this pleading were, in substance, that the defendant Ketron, conceiving it his duty to proceed to canvass the returns, attempted to have a meeting for that purpose, and invited Carr to be present, and that Carr ignored his invitation; that Ketron as a matter of fact opened and examined some returns that had been deposited in a bank at Tazewell and had discovered that some of the returns were not present, and found that others had plainly been altered. It was averred that after the election commissioners had met and adjourned without proceeding to canvass the returns, and after Carr had deposited the election returns in the bank, the said Carr and Kivett secretly and privately issued to Sharp a certificate showing the election of Sharp to the office of county trustee. It was averred that said certificate was issued in violation of the injunction theretofore granted and that it had been issued by the commissioners privately and while not acting as officials, and at a time

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when Carr, Kivett and Sharp knew that Sharp was not elected. It was averred that the returns of nine precincts of Claiborne County that were in the bank were not counted or canvassed by Carr and Kivett preceding their issuance of the certificate to Sharp, and it is further averred that they selected and retained and manipulated enough of the returns to furnish an excuse for issuing the certificate to Sharp. Complainant repeated his assertion that he was elected and denied the election of Sharp, and, in addition, averred Sharp's ineligibility to the office because of defaults in another office. The prayer of this bill was in substance that the pretended certificate of election issued to Sharp be declared void because in violation of the injunction and because not issued by the board of election commissioners and because Sharp was not elected. An injunction was ordered by Judge T. A. R. Nelson.

Reduced to their simplest averments, these pleadings present for our consideration the case of a candidate for office who claims that he was elected upon the face of the returns, and who seeks Court compulsion upon commissioners of election to canvass the returns before they were or are altered and to certify the results in disregard of the fraudulent alterations. At least, we shall treat the above simple statement as raising, upon the side of complainant, the principal question to be determined.

On the 24th of August the defendants Carr, Kivett and Sharp appeared before Chancellor Kyle and moved the Court to dissolve the injunction granted under the first bill for want of equity on its face. They also moved to quash the alternative writ of mandamus awarded by Chancellor Wright returnable to Judge Kyle on August 24th at chambers. The principal ground of this motion was that the writ should have been made returnable in due order to a Court and not to the Chancellor in chambers.

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It seems that on this same day the complainant prayed for an injunction under his third bill.

Chancellor Kyle, after hearing argument, overruled the motion to dissolve the injunction, but construed it to mean simply an injunction preventing the commissioners from doing anything wrong and illegal and as not enjoining them from proceeding with the discharge of their duties.

With respect to the motion to quash the alternative writ of mandamus, the Chancellor directed that said writ be returned and returnable to September rules. The application of complainant for a new writ of injunction was denied.

The alternative writ of mandamus was thereafter considered as having been issued and made returnable to the September rules. This was not acquiesced in by defendants, for they still point out in their brief this irregularity. But all defendants proceeded to answer the several bills without further exceptions. The answer of Sharp was in substance an averment that he had been elected, and that he was properly the holder of the certificate of election, and that Parkey had been defeated. His answer contains numerous averments of wrong, fraud and corruption upon the part of Parkey, but they are not pertinent to our present inquiry.

The answer of Carr and Kivett is the pleading to which we must direct our close scrutiny. When the case came on for regular hearing, the Chancellor adjudged the answer of Carr and Kivett to be insufficient, and on motion of complainant, ordered that a peremptory writ of mandamus issue, commanding the defendants, the election commissioners, to forwith canvass and count all the returns of the election held on August 1st as said returns were before altered or changed, and to issue to relator Parkey a certificate of election, provided all of said returns as they

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were before alteration and on their face showed that Parkey had received a majority of all the votes cast at said election for trustee. Carr and Kivett were ordered to pay the costs in the cause. To this decree the record recites that the defendants excepted and prayed and were granted an appeal from so much thereof as ordered the issuance of the peremptory writ of mandamus and holding the answer of defendants insufficient and ordering the canvass of the returns and a certificate of election be issued to relator. The record recites that defendants excepted to the entire order and decree. As a matter of fact, defendant Ketron did not answer and did not pray for nor perfect an appeal.

Numerous assignments of error are presented to us, supported by able briefs and argument. We have been furnished with elaborate briefs in support of the contention of the appellee. It is unnecessary for us and it would be profitless to make motion in this opinion of the multitude of authorities to which we are directed. We have not had access to all of them, nor had we time to examine them if they were available. We shall cite such only as are needed to sustain any disputed position in this controversy. It is needless to refer to cases supporting propositions that all good lawyers admit to be sound. We shall, nevertheless, undertake to respond to all the contentions made by learned counsel for appellants, although it may not be in the order in which they appear in his able brief.

Preliminarily, he urges that his motion to abate this suit as to the election commissioners should be sustained. It appears by an affidavit filed that some time in October, 1912, defendants Carr and Kivett tendered their resignation, and that their successors were appointed. It is insisted that the suit as to them is necessarily abated.

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There are two answers to this insistence. One is that they solemnly answered under oath that they were at the time of the filing of the answer and at the time of the holding of the election, commissioners of election for Claiborne County. There is no pleading or no document in this record emanating and sworn to by them showing that they had subsequently resigned. We think it too late for them now to rely upon a mere motion to abate. In the second place, we have reached the conclusion after extensive investigation that they cannot urge a resignation as an excuse for not complying with the mandate of a Court issued before resignation. This certainly ought to be, with respect to ministerial officers and boards, the universal rule, and we find it announced in quite a number of most respectable authorities. We rely upon these as sustaining our position, that although these officers be treated as having resigned, they may yet be compelled to assemble or reassemble and perform the personal and ministerial duties which they should have discharged as servants of the public and of the participants in the election: *State v. Pigott*, 24 Am. & Eng. Ann. Cases, 1258 and note; *Attorney-General v. County Canvassers*, 64 Mich., 607; *Lehman v. Pettingill*, 39 Col., 258; *Smith v. Lawrence*, 2 S. D., 185; *People v. Schiellen*, 95 N. Y., 124; *Simon v. Durham*, 10 Ore., 52; *State v. Berg*, 76 Mo., 136, and others which could be cited. There is nothing in any Tennessee case referred to by learned counsel which is in opposition to this view. Nor is there anything in any of the numerous cases cited from other jurisdictions which, in reality, is in contravention. They were in the main disposed of upon the ground that the canvassers had in fact discharged their duty of canvassing the vote, and that to reassemble and recanvass the vote in the particular cases involved contesting matters.

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The first error assigned is that the Chancellor should have quashed the alternative writ of mandamus made returnable to a Court in term. This assignment must be overruled.

The action of the Chancellor in virtually sustaining this motion at chambers and ordering a re-issuance of the writ returnable to the succeeding rule day at Tazewell was in effect ordering the issuance of a new writ. In addition, the record fails to disclose any objection made by defendants before answer and return to the amended alternative writ. They answered elaborately without further objection. It is too late for them now to insist upon the original irregularity.

Under this assignment of error appellants contend that the Chancellor was in error in sustaining the bill and awarding mandamus for the reason that the proceeding is none other than an election contest; and in the second place, that complainant is seeking by mandamus to have done that which has already been done.

With respect to the first point raised, it may be said succinctly that this controversy does not contain a single feature of an election contest. It is simply a proceeding to compel a board of election commissioners to discharge their ministerial duty of canvassing the returns as certified by the several election officers of the county, and to announce the result of this canvass, and to issue a certificate of election to the party receiving the highest number of votes shown by the face of the returns unaltered. Many cases supporting the proposition that this is not an election contest can be cited: *State v. Wright*, 10 Heiskell, 237; and also *Maloney v. Collier*, 4 Cates, 99. This exact point was necessarily determined in the case of *S. D. Gentry v. I. L. McGinnis*, a Bledsoe equity case disposed of by the Supreme Court without written opinion, at the

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September, 1907, term. The writer of this opinion is conversant with all the questions disposed of in that litigation, as one branch of it was before him as Circuit Judge in that county. The Supreme Court sustained the bill brought by Gentry, containing substantially similar averments to the bills now before us in this litigation. The Chancellor in that case compelled by mandamus a canvass of the vote as they were when certified by the election officers, and ordered the commissioners to issue a certificate in accordance with that showing. He expressly decided that the proceeding was not an election contest. His decree was in every respect affirmed by the Supreme Court.

Turning to that part of the contention made that this is an effort to have done that which had already been performed, we say that this is a misconception upon the part of learned counsel. The insistence here made by complainant is that these commissioners never did perform their duty, in that they never examined the returns as certified by the election officers, and never canvassed the returns as a whole, and, hence, that there was a substantial failure to discharge their duty. That election commissioners may be compelled to convene or reconvene and enter upon the discharge of their duty of canvassing the vote as originally certified, although they have already issued a certificate of election to another, is well established, and even if it were not a well fortified proposition of law, so far as authorities are concerned, it should be announced as the law of this State: 26 Cyc., 275, 276, 277; 15 Cyc., 384, and cases referred to in both volumes. This was expressly adjudged in *Smith v. Lawrence, supra*, and was, in effect, held in all the cases cited by us in response to the motion to abate. The rationale of these authorities is that the public and the participants in an election have the right to compel the board of election

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commissioners to discharge their full duty and to treat as nil any partial or illegal effort to perform their duties. It is clearly announced that it is no answer to the mandate of a Court to show that they had examined a part of the returns and had found difficulties and had declined to go further. In other words, the commissioners must show that they proceeded to canvass the whole returns as unaltered and to certify the result. Anything less than this is not a discharge of their duties and no excuse for a mandatory order to reassemble. So that we have here the case of a party asking for a mandamus to compel the performance of a duty which has never been discharged. The authorities relied upon by learned counsel to the effect that no Court will compel the doing over of that which has already been done are all sound, but they are not pertinent.

In the second assignment of error it is said that His Honor, the Chancellor, was in error in holding that the answer of Carr and Kivett was insufficient.

We have carefully examined and analyzed this answer and have reached the conclusion that the learned Chancellor was right in adjudging it insufficient. It is axiomatic that the answer of an officer to an alternative writ must be clear, frank and explicit. In other words, the responding party must show substantial causes or reasons for not having performed the acts demanded, and if he fails to set forth the reasons or satisfactory excuses for not having done so, the Court should decline to hear him further, and should order him to discharge the duty commanded at once.

In the instant case the action or duty sought was the assembling or reassembling of the board of election commissioners and the canvassing or recanvassing of the returns as they were before alteration and in disregard of

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alteration, and to certify the result. It is no answer to this command to state that they had already issued a certificate to another person when in the same pleading it is shown that this certificate was issued before the commissioners had canvassed the returns as the law required. Nor is it any answer to give a lame excuse for a partial discharge of their duties when it is shown that they went ahead and did that act, namely, the issuance of a certificate which must be done after all the returns have been examined. It is their duty to examine the returns, notwithstanding alterations and mutilations, and to make an honest endeavor to certify the result that was shown or would have been shown by the returns in their unaltered condition: *State v. Garesche*, 65 Mo., 480; *State v. McFadden*, 46 Neb., 668; 15 Cyc., 382. It is the duty of the commissioners, if they find an alteration, to make an effort to ascertain the condition of the returns as they appeared and were before this alteration; and if they find this difficult, they should reach some conclusion and report to the Court their investigation and their efforts: 15 Cyc., 384. Numerous other cases sustaining this position are referred to by learned counsel for appellee as digested in volume 33 of the Century Digest, page 2270, *et sequa*, and also as inserted in a note to 36 L. R. A. N. S., page 1090, all of which latter cases we have examined and find that they sustain this contention and are worthy of citation with approval.

Recurring to the answer of the defendants, it may be said that it is frank in the admission that the certificate had been issued to Sharp upon partial examination of the returns. The reasons given by defendants for not taking up these returns that were deposited in the Tazewell bank were insufficient. It appears from this record that their co-commissioner Ketron had access to these returns and

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that he had invited Carr and Kivett to examine them with him, and that they had declined to do so for reasons which we deem insubstantial. It is also well to bear in mind that the defendants nowhere denied in their answer the specific charges that the returns had been altered, nor do they deny the charge that they secretly assembled—that is, Carr and Kivett—and formulated and issued a certificate to Sharp. Upon the whole we are convinced that these defendants did not show any satisfactory reason for not having entered upon their duty to canvass the returns; and we repeat that their answer shows almost a total failure of performance of the duties which the law required of them: Acts, 1907, chapter 436; *Taylor v. Carr*, 125 Tenn., 240. That an answer must meet the material allegations of fact in a petition for writ of mandamus and that all averments of fact not denied are taken to be true is the well established rule: High, sections 521, 523; *State v. Marks*, 6 Lea, 12. The relator is entitled to the benefit of all admissions of fact found in the answer. Here we have the solemn admission that the commissioners had certified the election without examining a large body of the returns, averred in one of the bills as being the returns from the greater number of the voting precincts of the county. This admission demonstrates the weakness of their defense and also the invalidity of the certificate held by Sharp. At all events, the holding of the certificate upon the part of Sharp is no answer to an order of the Court that the commissioners proceed to the discharge of their ministerial duty of canvassing the returns.

We deem it unnecessary to make specific reference to the many authorities cited by learned counsel to the effect that the Chancery Court has no jurisdiction of an election contest case. That is conceded. Nor is it worth while

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to respond to the position that a Court cannot direct the commissioners to proceed in any certain way nor to announce any particular result. Nor shall we deny the insistence that the Court cannot in a mandamus proceeding pass upon the validity of the returns. These questions are not now pertinent. The only thing with which we are concerned is whether or not the Chancellor was correct in commanding the election commissioners to proceed to discharge their duty. Of this we have no doubt, and if right in this position, the greater number of the authorities referred to are not exactly in point. It must be remembered that there is no effort in this case to compel the commissioners to go behind the returns or to decide upon any question other than those of a purely ministerial nature.

It is said in assignment No. 3 that the peremptory writ should not have been ordered, for the reason that the Chancellor had theretofore adjudged that the commissioners were not restrained from issuing the certificate of election to Sharp. This is no answer to the command of the Court that they proceed to canvass the returns. Their subsequent issuance of a certificate of election cannot impair the right of complainant to have a canvass.

It is said in assignment No. 4 that the Chancellor erred in awarding the peremptory writ without having determined the facts upon which the writ must necessarily be based. This contention must be overruled. We have decided that upon the face of the record and upon the pleadings that complainant was entitled to the writ.

Error No. 5 is to the effect that the Chancellor should not have given any consideration to the bill filed August 16th, for the reason that it was never put at issue and no proof was taken thereon. It is not worth while to dwell upon this point, for the reason that we have treated all

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the pleadings as being incorporated into and becoming part of the original bill.

After a painstaking investigation, we have reached the conclusion that there was no error in the decree of the Chancellor, and the same is in all respects affirmed. Defendants Carr, Kivett and Sharp will pay the costs of this Court and will pay all the costs in the lower Court accrued up to this time. Costs subsequently accruing will be adjudged by the Chancellor. The cause will be remanded to the lower Court to be proceeded with in due order.

It must not be understood that we are adjudging that complainant was elected trustee, and that defendant Sharp is not entitled to the office. We expressly refrain from any intimation upon that point. We shall not refrain, however, from making some observations as to the conditions in Claiborne County revealed by this record. It should be borne in mind that public offices, as the name implies, belong to the people. It is not for the designing and the unscrupulous to hawk them about or to traffic in them as if they belonged to a few individuals who may be in position to bestow or withhold. It should not be overlooked that in this country the title to an office must be traced back to a free and untrammelled choice upon the part of the electorate, and that the man who asserts the right to an office must have not only the indicia of the place, but likewise indubitable evidence that he was the recipient of the honor and the emolument by an unpurchased expression of the majority. It does not always suffice that the claimant can exhibit a certificate of election. If that certificate has been issued without consulting and canvassing the declarations of choice by the people through the ballots which have been transmitted to the counting officers: if the certificate was handed over as the

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result of bargain and intrigue and without reference to those things upon which it must depend for validity, it should be treated as an invalid and a worthless paper. On the other hand, if a rival claimant has bought his way, has corrupted the ballot, and has intimidated the electorate and the electoral commission so as to render impossible the discharge by them of their duties, he should be deprived of any fruits which might otherwise come to him. If half the averments of the pleadings in this cause are true, then conditions in Claiborne County were last year in a deplorable condition indeed; and it is time that its good people rise up and see that the corrupt and the designing are retired from the stage, and that their agents, intrusted with the preservation and certification of their sacred ballots, shall be ministers of their, the people's, will, and not mere brokers and traffickers in official places.

It must not be inferred from the above that we pronounce either one of the contending parties to this controversy guilty of wrongdoing. It must not be gathered from the foregoing that we entertain any opinion as to the truthfulness of the several assertions and counter-assertions found in the pleadings. We have set down the above in the hopes that the people will be aroused to the anarchistic trend of the events in their midst and that they will determine to restore conditions to republican-democratic simplicity and honesty.

. Burns v. Ralston.

MRS. M. E. BURNS v. J. E. RALSTON.

Writ of certiorari denied by the Supreme Court.
(December Term, 1912.)

1. **HOMESTEAD.** *Right of widow in land sold by husband by parol.*

The widow of a man who, while a non-resident of Tennessee, sold lands lying in Tennessee by parol cannot after removal of her husband and herself to Tennessee assert a homestead therein.

2. **SAME.** *Election by husband.*

The wife is absolutely bound by the husband's selection of homestead if made in good faith by him, and not for the purpose of defrauding or defeating the wife.

3. **SAME.**

The election of the husband may be inferred from the retention by him of sufficient land to meet the homestead requirements.

FROM RUTHERFORD COUNTY.

Appealed from the Chancery Court of Rutherford County. W. S. BEARDEN, Chancellor.

DARWIN HANCOCK for Complainant.

BROWN & BROWN for Defendant.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS bill was filed by complainant to assert a homestead in two small parcels of land lying in Rutherford

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County. She claims this right as the widow of one John Burns. The Chancellor denied her application, and she has appealed to this Court. The decree of the Chancellor must be affirmed.

1. In 1893 or 1894, while her husband and she were residents of the State of Alabama, the husband sold the lands by verbal sale to his father, and received and appropriated the purchase money. The father took possession and held and controlled the lands for a length of time exceeding seven years. It is true that occasionally the husband made some assertions of ownership, but we find by the greater weight of evidence that the parol vendee remained virtually undisturbed as owner and possessor for the requisite number of years. Complainant was not at that time or at any time during the seven years entitled to a homestead in Tennessee. It is true she did not join in this conveyance and did not assent to the sale. Nevertheless, the husband parted with the title at a time when she could not assert any right, and her subsequent removal to this State did not vest her with any right which could attach to the land. The homestead right must be determined at the time when conveyance by the husband is made: 21 Cyc., 547.

2. For another reason she must be repelled. At the time complainant and her husband returned to Tennessee the husband was the owner of a parcel of land in Rutherford County worth more than one thousand dollars. He retained this tract for quite a number of years, and then conveyed it to complainant. Whatever rights complainant had in the lands of her husband as his wife or widow attached to this particular tract, as her husband had conveyed all of his other tracts to his father, and had estopped himself to question the father's title. Even if complainant could be said to have had any sort of claim of homestead

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to any or all of the lands of her husband situated in Tennessee, the sale of the two parcels to the father and retention by the husband of the tract which he subsequently transferred to complainant, must be held to have been an election by him to claim homestead in the latter tract. The wife is bound by the husband's selection of homestead made by him in good faith and without any intention of defeating or defrauding the wife: *Porter v. Porter*, 2 Tenn. C. C. A., 91. And this election upon the part of the husband may be inferred by the retention by him of a parcel of land of one thousand dollars or more in value. The decree of the Chancellor is affirmed with costs.

C. D. ADKISSON, EXTR., v. RAYMOND C. ADKISSON.

Writ of certiorari denied by the Supreme Court.

(*Nashville*. December Term, 1913.)

1. *WILLS. Construction.*

The will in this case is in the following language: "I desire that my house and lot on High Street go to my mother her lifetime and then to my son, \$1,000.00 life insurance to my mother, the balance to my wife, my estate to be administered on by my wife and brother without bond. If my brother Cliff desires to buy my interest in store I think it worth about sixty-five cents on dollar. I desire that my wife be guided in the settlement by my brother Cliff, as I know him to be honest and will treat my wife and son right." *Held*, That wife took all the property of the testator excepting the house and lot and \$1,000 of life insurance.

2. *SAME. Rule of construction.*

The intention of the testator is the object of all canons of construction; and in the effort to ascertain this intention the

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Courts will strike out or insert words or transpose them, change punctuation and resort to other methods.

3. SAME.

In the opinion will be found a collation of all the leading cases in Tennessee involving the construction of wills.

FROM MAURY COUNTY.

Appealed from the Chancery Court of Maury County.
WALTER S. BEARDEN, Chancellor.

GREENLAW & WHITTHORNE for Complainant.

B. C. DEDMAN for Defendant.

MR. JUSTICE WILSON delivered the opinion of the Court.

THE bill in this case was filed July 30, 1913, by C. D. Adkisson and Mrs. Ida L. Adkisson, executor and executrix, of the last will and testament of Raymond C. Adkisson, deceased, and by them individually, and by Mrs. M. A. Adkisson, the mother of the deceased, for a construction of his will.

The bill was filed against the minor son of the deceased, his only child.

Said Adkisson died April 3, 1913, in Maury County, and his will was duly probated in said county.

We here copy the will as written, with its punctuation, the original will having been sent up with the record:

“My last will and testament.

“I desire that my house and lot on high street between 8th and 9th go to my mother her life time and then to my son, \$1000 life insurance to my mother, the balance

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to my wife, my estate to be administered on by my wife and my brother without bond. If my brother Cliff desires to buy my interest in store, I think it worth about 65c on dol. I desire that my wife be guided in the settlement by my brother Cliff, as I know him to be honest and will treat my wife and son right.

"October 13, 1912.

R. C. ADKISSON."

This will is in the handwriting of the testator, but appears to have been witnessed by two parties.

He owned at his death a half undivided interest in nine houses and lots in Columbia, Tenn., worth over \$21,000. This property had incumbrances on it amounting to \$3,470.00. He owned in his own individual right a house and lot on South High street in Columbia, devised to his mother for life with remainder to his only child, the minor defendant, stated in the bill to be worth \$3,000.00, but shown in the proof to be worth \$4,000.00.

He owned half of five shares of the capital stock of a bank in Columbia of par value, and, also, a half interest in a mercantile business conducted by himself and his brother on the Public Square in Columbia. This mercantile business carried in stock merchandise of the value of \$18,000. The indebtedness of this mercantile partnership at the death of the testator amounted to about \$4,000.00. He carried \$5,000.00 insurance on his life, \$3,000.00 in the Modern Woodmen of the World, and \$2,000.00 in the Michigan Mutual Life Insurance Company. Two thousand dollars of this insurance was made payable to his wife, complainant Mrs. Ida L. Adkisson, \$1,000.00 to his mother, complainant Mrs. M. A. Adkisson. The \$2,000.00 insurance in the Michigan Mutual Company was made payable to his executors, etc.

In brief, the deceased, at the time of his death, had, aside from the life insurance carried by him, accumulated

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an estate, real and personal, of the net value of about \$21,000.00 or more. He had accumulated this estate by his own exertions.

He was a man of integrity and fine business judgment and capacity. He deservedly held the entire confidence of his friends and business associates until his death.

While suffering for some months before his death with nervous troubles, his mind and fine business judgment continued clear and sound until his end came.

His relations with his wife and only child and with his mother and brother were at all times kind and affectionate.

There is no conflict in the evidence as to the foregoing facts.

Several witnesses gave evidence, which was admitted over the objection of the guardian *ad litem*, to the effect that the deceased had very positive and fixed convictions as to the un wisdom of parents allowing or giving their children, especially boys, much money or property, expressing the opinion, from his observation, that it tended to destroy their self-reliance and proper appreciation of the value of money, which would be developed by their own exertions in making it, and that he wanted his son, as he had done, to make his own way in the world.

This is the substance of the testimony, admitted over objection, with respect to this feature of the case.

The question of dispute in the construction of the will in hand arises from the clauses or sentence of the will immediately following the devise of the house and lot on High street for life to the mother of the testator with remainder to his son—" \$1,000.00 life insurance to my mother, the balance to my wife."

The contention of the *guardian ad litem* of the minor is, that under the will, the wife takes simply the balance

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of the insurance left by her husband, and that the deceased died intestate as to his estate, aside from the devise of his house and lot on High street and his life insurance.

As a corollary to this contention, his insistence is that the wife, having qualified as executrix under the will and accepted its provision made therein for her benefit, she can claim no share or interest in his estate as to which he died intestate. The contention of complainants, on the other hand, is that the intention of the testator was to give all of his estate to his wife, aside from the devise of his house and lot on High street to his mother for life with remainder to his son, and \$1,000.00 of insurance to his mother.

The learned Chancellor sustained the contention of complainants. In other words, the Chancellor construed the will as giving the wife of the testator all of his estate, except the devise of his house and lot on High street and a gift of \$1,000.00 of his insurance to his mother, and that the testator did not intend to die intestate as to any of his property.

The guardian *ad litem* was dissatisfied with this construction of the will and appealed the case to this Court. He assigns four formal errors before us.

The first and second may properly be disposed of together, as, in legal substance, they present the same question—that is, that the Chancellor should have construed the will as having given the house and lot on High street to the mother of the testator for life with remainder to his son, and that aside from this devise and the gift of his insurance as above stated, he died intestate as to the remainder of his estate.

Likewise, the third and fourth assignment of error may be considered together, as they refer to the admission of testimony over objection. The generally accepted

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definition of a will is, that it is a disposition of property to take effect after the death of the testator. *Fry v. Taylor*, 1 Head, 954; *Swinney v. Swiney*, 14 Lea, 316; *Horn v. Broyles* (Ch. App.), 62 S. W. Rep., 304; *Johnson v. Johnson*, 103 Tenn., 32-38.

The fundamental and controlling rule to which all others are subordinate, with a few exceptions, in the construction of wills, is as to ascertain the intention of the testator, and having ascertained that intention, whatever it may be, it should be carried out, unless it contravene the public policy of the State or some fixed rule of law.

We suppose that it is unnecessary to cite authorities in support of the above propositions. We refer, however, to the following cases decided by the Supreme Court of this State. Probably fifty or sixty more might be cited. *Henderson v. Hill*, 9 Lea, 25; *Jones v. Hunt*, 96 Tenn., 369; *Dixon v. Cooper*, 86 Tenn., 177; *Fry v. Shipley*, 94 Tenn., 252; *Hadley v. Hadley*, 100 Tenn., 445; *Ensley v. Ensley*, 105 Tenn., 107; *Ridley v. McPherson*, 100 Tenn., 402; *East v. Burns*, 104 Tenn., 169-183.

While this intention of the testator is to be gathered from what is found within the four corners, within the lids of the instrument; that is, from the particular words used in the will, their context, and the general scope and purpose of the instrument. *Hadley v. Hadley*, 100 Tenn., *supra*; *East v. Burns*, 104 Tenn., *supra*; *Dixon v. Cooper*, 86 Tenn., *supra*; *Williams v. Williams*, 10 Yer., 20, 21; *Lynch v. Burts*, 1 Heis., 600-604; *Armstrong v. Armstrong*, 4 Bax., 357-359, yet this rule does not preclude Courts from hearing parol testimony that will enable them to put themselves as near as possible in the situation of the makers of the wills whose language is to be interpreted; such, for instance, as shows the state of facts under which the wills were made, the situation of the properties of the

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testators, the members of their families and other relevant or cognate facts. Pritchard on Wills, section 499; Schouler on Wills, section 466; *Gannaway v. Tarpley*, 1 Cold., 572; *Bunch v. Hardy*, 3 Lea, 544-547; *Ballentine v. Wright*, 7 Lea, 26-30; *Hottell v. Browder*, 13 Lea, 676-679; *Dickson v. Cooper*, 88 Tenn., 177; *East v. Burns*, 104 Tenn., *supra*.

We need only observe, in this connection, that the testator's intention, as disclosed by the language of his will when read in the light of the facts and circumstances surrounding him at the time of its execution, will not be set aside or disregarded by proof *aliunde*, showing, however, clearly a different intention on the part of the testator.

But when a will is read in the light of the facts and surrounding circumstances of its execution, it may, and often does, justify the judicial expositor in departing from the strict grammatical construction of the testator's language. *Gannaway v. Tarpley*, 1 Cold., *supra*; *East v. Burns*, 104 Tenn., *supra*.

The intention of the testator is to be gathered from the scope and tenor of the whole of his will, and not from detached or isolated parts of it. *Hottell v. Browder*, 13 Lea, 676; *Rodgers v. Rodgers*, 6 Heis., 489-496; *Fraker v. Fraker*, 6 Bax., 350; *Simpson v. Smith*, 1 Sneed., 394-396; *Boyd v. Robinson*, 93 Tenn., 1; *Overton v. Nashville Trust Co.*, 110 Tenn., 50; *Nichols v. Guthrie*, 109 Tenn., 535.

Perhaps dozens of other cases might be cited in support of the rule just stated.

Our Courts has also said that in contesting wills, a strict observance of the grammatical sense of the sentences or languages used will be departed from, where following it would nullify the intention of testators. *Reid v. Hancock*, 10 Hum., 368; *Sharpe v. Allen*, 5 Lea, 81-85.

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And under this rule, where the grammatical construction of the instrument would defeat the intention of the testator, or where the words used are unintelligible, obscure or absurd, and give no effect to the testator's manifest legal intention, the Court in order to carry out this intention, may transfer, reject or supply words. Prichard on Wills, section 395; Jarman on Wills, 75; *Fry v. Dilard*, 104 Tenn., 658; *Simpson v. Smith*, 1 Sneed, *supra*; 1 Williams on Exrs., 203, 204; *Gourley v. Thompson*, 2 Sneed, 387-392; *Eatherly v. Eatherly*, 1 Cold., 462-466.

Again, the Court in construing wills has the right, and it may become its duty, to supply punctuation when necessary to clearness. *Wooten v. Reid* (Chy. App.), 53 S. W., 991; *Randolph v. Wendel*, 4 Sneed, 647-690.

And said our Court:

"If the instrument be evidently written by an unskilled hand, the common and popular sense of terms and expressions used must prevail rather than the technical sense, and, in such cases, the intention is often apparent, in spite of strict grammatical restraints or the effect of unskilled punctuation. And, indeed, although the devolution of large estates is sometimes made to depend upon the effect of a semicolon, yet we recognize the force of an observation of the Supreme Court of the United States in *Ewing v. Burnett*, 1 Pet., 41, that punctuation is a most fallible standard by which to interpret a writing.

The rule is thus stated in the English authorities:

Such, indeed, is the respect paid to intention that a construction may be made to support it, when plain upon the whole will, even against strict grammatical rules.

But an express disposition cannot be controlled by inference." *Purveyor v. Edmondson*, 4 Heis., 43-50; *Edmonson v. Edmonson*, 1 Cooper Chy., 563-567; *Jones v. Hunt*, 96 Tenn., *supra*.

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It is well settled, of course, that parol evidence is not admissible to contradict, add to, or explain a will, when there is no ambiguity on its face. *Clark v. Clark*, 2 Lea, 723-725; *Weatherhead v. Sewell*, 9 Hum., 272.

But, as before stated, it is competent to admit parol testimony to show the condition and facts in which the testator was situated when he made his will, and for the Court to read and construe the will in the light of these facts, as expressed by the whole of his will.

It is also settled in this State, if there be no ambiguity in the terms of a will, it is not competent to show by the declaration of the testator what he meant by the use of the terms. *Hennegar v. Deadrick* (Chy. App.), 54 S. W., 138; *Weatherhead v. Sewell*, 9 Hum., 272; *Gourley v. Thompson*, 2 Sneed, 387-391; *Rodgers v. Rodgers*, 6 Heis., 489-500.

The general rule is, that, if a party engage in the solemn act of executing his will, it will be presumed, in the absence of a contrary intent, clearly appearing on the face of the instrument, that he intended by it to dispose of all of his property and not to die intestate as to any of it. *Payne, et al., v. Gupton, et ux.*, 11 Hum., 401-403; *Gourley v. Thompson*, 2 Sneed, 386-393.

With the facts stated and the rules of law stated applicable to the construction of wills, especially of wills drawn by unskilled and inexperienced men in the business of preparing such instruments, we come to the decision of the questions presented by the appeal involving the construction of the will of Raymond C. Atkisson, deceased.

In construing it, we may readily, under the authorities, ignore the punctuation adopted by the testator, or his failure to use punctuation properly, or his failure to use it altogether, if, by so doing, we can fairly ascertain, from his whole will, read in the light of the facts and circum-

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stances surrounding him when he executed it, his dominant or main intention in making it. Likewise, we may, for the same purpose, ignore the fact that he failed to separate the sentences or clauses of his will by ending each with a punctuation period and commencing each with a capital letter.

So, if it be necessary to effecuate his intention as manifested by the whole will, we may transpose a sentence or sentences in it, properly punctuate it, reject words, and supply words.

If these things be permissible, as we think they are under the great weight of authority, and especially of our own cases, it seems to us that we have a reasonably clear road leading us to a correct construction of the will before us.

In the first place, we hold that the testator in making it intended to dispose of all of his property. He starts out with designating it, "My last will and testament."

He says, "My estate to be administered on by my wife and brother, without bond." What estate? His whole estate, or part of it? Presumably, as the cases hold, he did not intend to die intestate as to any of his property, and, this being so, he meant to use his language, "his *whole* estate to pass under his will and be 'administered' on."

This construction is fortified by what immediately follows in the will. If he did not intend for all of his estate to be "administered on" under his will, why say, "if my brother Cliff desires to buy my interest in store I think it worth about 65c on dollar"? and why, "desire my wife to be guided in settlement by my brother Cliff," as he knew him "to be honest," and that he would "treat his wife and child right"?

We think the intention of this testator is reasonably clear and manifest in the terms of his will, and if we

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supply manifestly omitted words and punctuate it properly, his intentions is, in our opinion, absolutely certain.

The will should be reads as follows:

"I desire that my house and lot on High street between 8th avenue and 9th, go to my mother her life time and then to my son. I give \$1,000.00 of my life insurance to my mother. The balance of my estate I give to my wife. I appoint my wife and my brother as my representatives to settle up my estate."

In short, this whole will will be clarified by inserting after the "gift of \$1,000.00" of his insurance to his mother after the word "balance," the words "of my estate" to my wife.

It is certain that this husband was devoted to his wife, and had the utmost confidence in her.

It is hardly reasonable to suppose that he intended to cut his wife off with the pittance of a thousand or two of insurance money, leaving her with their only child, a little boy three years old, on her hands to raise and care for, or to force her to the humiliating alternative of dissenting from his will and claiming rights adversely to his will under the law.

Especially is this assumption not warranted with respect to this affectionate testator for his wife, having the estate he had accumulated, when we consider the greater gift and devise he made to his aged mother for life, and to his minor child left on the hands of his wife.

With respect to the assignments of error complaining of the admission of parol testimony, we need only say, in addition to what is before said, that parol declarations of the testator, to the effect that he had made a will and as to its provisions, in full accord with the will he wrote and left as his will were competent.

Declarations not in accord with the provisions of his will were not admissible.

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What has been said disposes, in legal effect, of all the questions raised under the pleadings by the assignments of error.

We wish to say, and deem it proper to say, in concluding this opinion, that the young guardian *ad litem* has most commendably made an able and gallant fight, though a losing one, for his ward. We say this, because it frequently occurs in cases before us that guardians *ad litem* perform their duties in a purely perfunctory manner, merely committing the interests of their wards to the protection of the Court.

The decree of the Chancellor will in all respects be affirmed, and the cause will be remanded to the Chancery Court of Maury County for the administration of the estate of Raymond C. Adkisson in accordance with the decree of the Chancellor and the opinion and decree of this Court.

We are of opinion that in view of the nature of the case the cost so far incurred should be paid by the estate of the deceased, R. C. Atkisson.

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LOUISVILLE & NASHVILLE RAILROAD CO. v. ADDIE
BELLE HUNTER.

(Jackson. January Term, 1914.)

1. VERDICT, EVIDENCE TO SUSTAIN. *Duty of appellate court in regard thereto.*

An appellate court must accept the finding of a jury on issues of fact, when there is any evidence to support that finding, and take as true the strongest legitimate view of that evidence supporting the verdict, and disregard all countervailing testimony.

2. VERDICT. *Not excessive, when.*

A verdict for \$1,000.00 is not so excessive as to indicate passion, prejudice or caprice on the part of the jury, where it appears that one with an earning capacity of \$50.00 per month, and only thirty-four years old, has suffered the dislocation of one ankle and the spraining of the other, and was thereby temporarily rendered unconscious and unable to walk, and was under the care of a physician for a month, and who, ten months after the injury, could not stand on her feet exceeding thirty minutes at a time, and whose injuries are permanent.

3. EVIDENCE OF MATTERS NOT PLEADED. *When admissible.*

In an action for personal injuries to a woman, alleging that her feet and ankles were badly wrenched and sprained and that she was otherwise bruised and injured, from all of which she suffered great mental and physical pain and was permanently injured and disabled, it is competent for the injured party to introduce evidence that her catamenia had, previous to the accident, been regular, the "periods" lasting only three days, whereas the first "period" after the accident lasted ten days, and she called in a physician, where it appears there was no effort to recover for the disturbance of the menses, but where the evidence of the disturbance was introduced merely as evidence of the extent of the other injuries for which recovery is sought.

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4. EVIDENCE, MORTALITY TABLES. *Admissible in cases other than for death or total disability, when.*

Where an injury is such as to permanently diminish one's earning capacity, though the earning capacity is not wholly destroyed, mortality tables are admissible in evidence.

5. SAME. *Not necessary to be proven by an expert.*

One testifying, with mortality tables before him, that they are treated as authority, though not an expert, can give in evidence the life expectancy of another.

6. EVIDENCE, EXCEPTIONS TO. *Cannot change grounds of in appellate court.*

Exceptions to evidence based on untenable grounds in the trial court cannot be so changed in the appellate court as to put the trial court in error.

7. EVIDENCE. *Presumption that evidence withheld is against the party withholding.*

Competent and pertinent evidence within the knowledge and control of a party which he withholds is presumed to be against his interest and insistence.

FROM HAYWOOD COUNTY.

Appeal from the Circuit Court of Haywood County.
THO. E. HARWOOD, Judge.

J. W. E. MOORE & SON for Plaintiff in Error.

KINNEY & WILLS for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

ADDIE BELLE HUNTER brought this suit in the Circuit Court of Haywood County against the Louisville & Nashville Railroad Company, to recover damages for personal

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injuries. The case was tried before the Circuit Judge and a jury, and a verdict rendered for \$1,000, and judgment entered thereon. The railroad company appealed to this Court, and has assigned errors to the number of ten. One of the assignments makes the question that there was no evidence to support the verdict, and another that the amount is so excessive as to indicate passion, prejudice or caprice on the part of the jury. It will avoid repetitions to consider these two assignments together.

On July 15, 1912, plaintiff below was a passenger on one of the trains of plaintiff in error, her destination being Brownsville, Tenn. She testified that, after the train had reached Brownsville and the conductor had called, "All off for Brownsville," and after the train had stopped, she arose from her seat and went onto the platform and then onto the top step to alight, and as she was in the act of stepping to the step next below the top one the train lurched forward and she was thereby thrown off her balance and the heel of her left shoe became caught or hung on the upper step, and as a result she was thrown or fell "sprawling to the ground," and one ankle sprained and the other dislocated, and her knee skinned, and she was rendered temporarily unconscious, but immediately, and before removed, or while being taken from where she had fallen, regained consciousness; that she was unable to walk and, therefore, taken in a buggy to the home of a Mrs. Claiborne in Brownsville; that she was there kept, and attended by a physician for two weeks, after which time she was taken to Stanton, and remained there for two weeks more under the care of a physician, when she was taken to Nashville, her home, where she was further attended by a physician; that as a result of her injuries she was made nervous and suffered severe pains, and incurred doctor bills to the amount of more than \$50.00, and was still

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largely disabled at the time of the trial of the case in the Court below, which was on May 27, 1913, or more than ten months after her injuries were received. She testified that she had previously been engaged as a teacher in the public schools of Nashville for twelve years, and, at the time injured, was receiving \$50.00 per month, and that she had done other services for which she was paid \$30.00 per month, indicating, however, that the two services were not rendered contemporaneously; and testified further that her feet and ankles still pained her at the time of the trial, and as a result of her injuries she was unable to stand on her feet to do her "regular work" longer than thirty minutes at a time because of the fact that her ankles got weak and gave out and pained her, and that she still suffered a great deal with her nerves and had to be treated because of nervousness; and she offered the testimony of a physician who attended her, at the time she was injured and saw her later, and who fully corroborated her as to the extent and character of her injuries, and that the injuries to her feet and ankles were necessarily very painful, and that they were still tender and swollen at the time of the trial, and that he considered her injuries permanent. She offered the testimony of other witnesses corroborating her as to the manner in which she was injured; one other witness testifying that the train made the lurch forward after it had come to a stop and at the time she was in the act of alighting, and that she was thereby thrown; and corroborating her as to the heel of her shoe getting caught and held until it pulled off and she was thereby released; and she had another witness swear that the top step where the shoe heel was caught was split, and the witness who corroborates her on this matter indicates that one edge of the step stood up about a quarter of an inch higher than the other at the

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place where this split was. He swears further that after the shoe heel pulled off it was left on the step, "right at the crack." That the shoe heel was pulled off and left on the step is testified to by other witnesses. One of the witnesses for defendant below who did not see her fall but did see her just after she had fallen, says, "She was hanging from the platform I guess about the first thing I saw of it, and after her heel gave way she (was) released and came down"; and another one of the witnesses offered by defendant below testifies to having seen her when she was "in a hanging position on the hand hold of the coach."

In the face of this testimony we do not see how it could be seriously contended there was no evidence to support the verdict. If the train had come to a stop after the passengers had been invited to alight, and such is the testimony of plaintiff below and another witness, and if, while plaintiff below was in the act of alighting, the train was made to lurch forward and throw her, and if because of a defect in the step of the coach her heel was caught and one foot was held up on the step and the other went down on the ground, as some of the testimony indicated, and both feet were thereby so twisted as that one ankle was sprained and the other dislocated all without fault on the part of plaintiff below, as the testimony also indicates, there certainly was a cause of action; and, whatever the testimony may have been to the contrary, the jury having found the issues in favor of plaintiff below, this Court must accept that finding and take as true the strongest legitimate view in its favor, and disregard all countervailing testimony. *Chattanooga Machinery Co. v. Hargraves*, 3 Cates, 476; *Lumber Co. v. Banks*, 10 Cates, 627.

Nor are we prepared to say that the verdict of \$1,000 in favor of one who has suffered the dislocation of one

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ankle and the spraining of the other, and who, because of those injuries was rendered temporarily unconscious and unable to walk, and was under the care of a physician for a month before she could be taken to her home, and then further under the care of a physician, and whose injuries were so very painful as the evidence in this case indicates the injuries of defendant were, and who more than ten months thereafter was disabled to the extent that she could not stand on her feet exceeding thirty minutes at a time, and whose injuries were, as some of the evidence indicates, permanent, is so excessive as to indicate passion, prejudice or caprice on the part of the jury—especially when, added to these facts are the further facts that defendant below was only thirty-four years old, with a life expectancy of thirty-one years, and a teacher with an earning capacity of \$50.00 a month, and when she has incurred doctor bills to the extent of more than \$50.00, all of which there is evidence to establish.

The assignment of error most seriously insisted upon—and it is pressed with earnestness and ability—is that the trial Court committed error in admitting, over the objection of the railroad company, evidence of defendant below to the effect that, preceding the time of the accident, her catamenia had been regular, the “periods” lasting only three days, whereas the first “period” after the accident lasted ten days, and she called in a physician. The insistence is that this injury to plaintiff below was not covered by the declaration and that, therefore, the evidence in regard to it was incompetent, and that it was prejudicial to the plaintiff in error.

The declaration alleges that the “train lurched or moved throwing the plaintiff off of her balance and down the steps, greatly frightening, shocking and injuring the plaintiff, and badly wrenching, spraining and injuring her

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feet and ankles and otherwise bruising and injuring her, and from all of which the plaintiff has suffered great mental and physical pain and is permanently crippled and injured and disabled;" and, further, "that she is permanently crippled and injured and disabled and her capacity for labor and business and the enjoyment of life greatly and permanently impaired"; and nothing else is found in the declaration setting out the character and extent of her injuries.

We find this question as to whether the declaration should allege such injuries as a disturbance of the menses in order to make it a basis of recovery, when allegations of other injuries only have been made, one as to which the authorities are in much conflict. As an indication of this conflict take the following from 4 Seg. on Damages (9th Ed.), section 1270a:

"Not only must special damages be alleged in order to be recovered, but the allegation must describe them with sufficient precision to give the defendant notice of the extent of the claim. It is impossible to reconcile all the decisions upon this point. In New York the following rules seem established: If the allegations as to the physical injury are very broad, setting up sickness, permanent injury, etc., the plaintiff may under them prove any special damage that has occurred—*e. g.*, an injury to the spine. If the defendant desires to guard against surprise, it is his business to move for a bill of particulars. But if the allegation point to a definite injury—*e. g.*, an injury to the arm—the plaintiff cannot prove some other injury—*e. g.*, deafness—merely because there are general allegations of severe injury and shock. In accordance with these rules general allegations have been held to cover injuries not specifically mentioned. On the other hand, where all the allegations of special damages are of specific injuries,

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it is usually held that there can be no recovery for injuries not described, though recovery has been allowed in some cases."

We find in the case of *Montgomery v. Lansing City Electric R. Co.* (Mich.), 29 L. R. A., 287, a helpful consideration of this question. There a declaration contained allegations of various injuries to face, head and body and arms, with specifications that the eyes were badly bruised and discolored, some teeth loosened, lips cut and lacerated, back and spine seriously hurt, crippled, bruised and sprained and injured, with the allegation that the injuries were permanent, but no allegation of injuries to lungs. Yet evidence of an injury to the lungs was held admissible over objection. In discussing the law involved, and reviewing previous pertinent cases, it was there said:

"The declaration in *Johnson v. McKee* (27 Mich., 471), is substantially that 'defendant assaulted plaintiff, and struck him a great many violent blows on and about the face, nose, head and body, thereby severely wounding the plaintiff upon the face, head and body, breaking the cartilage of the nose, and inflicting great and permanent injuries upon and to his face, head and body; by means of which several premises said plaintiff was then and there greatly hurt, bruised and wounded, and became and was sick, sore and disordered, and so remained for a long space of time, to-wit: from the time of said assault to the present; whereby the said plaintiff was obliged to and did necessarily pay, lay out, and expend five hundred dollars in an endeavor to be cured of the bruises, wounds, sickness, soreness and disorder aforesaid.' Mr. Justice Campbell for the Court said: 'The battery consisted in striking McKee with a chair, whereby certain injuries were inflicted on his face and head, and in consequence of which he was seriously, and, as is claimed, permanently, affected.

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Among other results, there was evidence that he suffered from a urinary difficulty caused or aggravated by the blow. It was claimed this injury was not within the terms of the declaration, and could not be shown without express averment. If the evidence showed any such resulting injury, it showed it to have been as closely connected with the blow as any of the other evil consequences. It was a sickness produced by it in the same way as the swelling and soreness in the head and eyes, and the other grievances about which no question was made on the trial. The declaration charges sickness and pain to have been among the sufferings caused by means of the assault, and we do not think the rules of pleading require any more specific description than was given. We need not inquire how far it was requisite to go in declaring for consequences not necessarily following such an injury, because these consequences are very clearly set forth. When the defendant was informed that damages were sought for sickness and disorder, and their attendant expenses, as well as for wounds and bruises, he was bound to expect evidence of any sickness the origin or aggravation of which could be traced to the act complained of.' It will be seen that the rule thus laid down does not require plaintiff to aver all the physical injuries which he sustained, or which may have resulted or be aggravated by the tort, even though they do not necessarily result from the original injury. If such injuries can be traced to the act complained of, and are such as would naturally follow from the injury, they need not be specifically averred. The testimony in the present case shows that the injury to the spine and back might, and probably would, result in injury to the lungs. *Johnson v. McKee* was cited and followed in *Welch v. Ware*, 32 Mich., 77. In *Elliott v. VanBuren*, 33 Mich., 51, 20 Am. Rep., 688, the Court, in speaking of

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the objection to the evidence tending to prove the continued result of the assault in bodily weakness and malady, and the fact of the plaintiff's suffering from fits, said: 'Upon the first of these points the case is covered entirely by the decision of *Johnson v. McKee*, 27 Mich., 471.' Again, in *Keyser v. Chicago & G. T. R. Co.*, 66 Mich., 400, the case of *Johnson v. McKee* is cited and approved. The rule of the case of *Johnson v. McKee* is but the reiteration of the rule laid down by the law-writers upon this subject, and adopted by other Courts as well as this. Sutherland, in his work on Damages (Vol. 3, 2d Ed., pp. 2661, 2662), says: 'The general rule in tort is that the party who commits trespass or other wrongful act is liable for all the direct injury resulting, although such injury could not have been contemplated as the probable result of the act done. Plaintiff may show specific, direct effects of the injury, without specifically alleging them, as that he was thereby made subject to fits. If they were a part of the result, the plaintiff may recover for such damages without specially alleging it, as well as the pain and disability which followed. *Tyson v. Booth*, 100 Mass., 258. The obvious probable effect of the injury may be given in evidence, though not laid in the declaration.' In this connection Judge Sutherland cites *Johnson v. McKee*. This rule has been followed in the following cases: *Ohio & M. R. Co. v. Hetch*, 115 Ind., 443; *Ehrgott v. New York*, 96 N. Y., 264, 48 Am. Rep., 622; *Delie v. Chicago & N. W. R. Co.*, 51 Wis., 400; *Schmidt v. Pfeil*, 24 Wis., 454; *Birchard v. Booth*, 4 Wis., 67; *Morgan v. Kendall*, 124 Ind., 460, 9 L. R. A., 445; *Sloan v. Edwards*, 61 Md., 98; *Hussey v. Ryan*, 64 Md., 426; *Denver & R. G. R. Co. v. Harris*, 122 U. S., 597, 30 L. Ed., 1146. In this last case it appeared that the plaintiff was injured by a gunshot wound in the hip. Among other things, he was allowed

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to and did prove that one of the consequences of the wound was the loss of procreative power, resulting direct and proximately from the nature of the wound. Mr. Justice Harlan, speaking for the Court, said: 'Because of the fact that the loss did result directly and proximately from the nature of the wound, evidence of this fact was, therefore, admissible, though the declaration does not in terms specify such loss as one of the results of the wound.'

From these authorities it would appear that the evidence of a disturbance of plaintiff below's menstruations was probably competent, she having alleged in her declaration that she had suffered great mental and physical pain and was permanently injured and that her capacity for the enjoyment of life was greatly and permanently impaired; but we are of opinion that it is not necessary to rest our conclusions as to this matter on these authorities, or even commit ourselves to any line of authorities on the question; and we do not do so, for this reason: The fact is, there was no effort to show anything further or otherwise in regard to the character of disturbance in question than that the next menstrual period after the injuries complained of was disturbed as already mentioned. The matter was not referred to by any other witness or at any other time except the one time by plaintiff below.

In *Bruce v. Beall*, 15 Pickle, 303, Beall brought suit to recover damages for personal injuries alleged to have resulted from the negligence of his employers, and in that case a question, in principle the same as the one now under consideration, arose. The question itself and the disposition thereof appear in the following extract from the opinion in that case:

"Beal, the plaintiff below, while being examined as a witness in his own behalf, was permitted, over the objection of the defendants below, to say that, before the in-

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jury complained of, he 'could read, and was studying medicine, and was going to school, but that since it occurred he could not read.' It is now alleged that this was incompetent. However, it was not averred in the declaration that this special injury resulted from the negligence of the defendants below. The rule is well settled that to recover for special damages they must be stated in the declaration. 1 Sutherland on Damages, p. 763; 2 Greenleaf on Evidence, p. 254 (14th Ed.); *Burson v. Cox*, 6 Bax., 360. And if it appeared that this evidence had been offered for the purpose of resting upon it an independent claim for damages, it certainly would have been incompetent. But it is clear that this was not the purpose of the counsel of plaintiff below, but that this evidence was offered with the view of throwing light on one of the questions in controversy, to-wit: the extent of plaintiff's injuries, among which the declaration averred, was spinal concussion. No effort was made to show any pecuniary loss on account of the plaintiff's inability to study or to go to school, and, in the absence of such efforts or claim, it was competent for it to go to the jury as tending to prove the seriousness of the injuries complained of. *Mass. Mills Co. v. Smith, et als.*, 69 Miss. Rep., 299; *Railroad v. Hicks*, 5 Sneed, 427."

We need but add that a careful reading of the record in the case at bar discloses that there was no effort to recover for the disturbance of the menses, but that the matter was referred to merely as an evidence of the extent of other injuries for which recovery was sought, as was the fact that following her injuries she had headaches; and for the reasons indicated in the quotation last made we think there was no error in the action of the trial Court in admitting the testimony.

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Another insistence made on behalf of plaintiff in error is that the trial Court committed error in permitting in evidence mortality tables showing the life expectancy of plaintiff below; the contention here being that as this is not a case of death resulting from injuries, or a case of total disability, the mortality tables were not competent as testimony, and also that the witness by whom the evidence was produced was not an expert. As to the question of the witness' not being an expert, it can be said that he testified with the tables before him, and testified that they were treated as authority. Where this is shown we do not understand that any thing more is required, if the case is one where mortality tables are admissible as evidence. Under the law such tables, where admissible at all, can be established by offering in evidence books of generally accepted authority which contain such tables, such as encyclopaedias, reports of decisions, books used by reputable insurance companies, etc. 8 Encyc. of Evidence, 639; *Notto v. Atlantic City R. Co.*, 17 L. R. A. (N. S.), note on page 1138. See also *Railroad v. Ayres*, 16 Lea, 725. Some Courts go to the extent of holding that, age being shown, they will judicially know the life expectancy. 8 Encyc. of Ev., 639.

As to the contention that the evidence was not admissible because plaintiff in error was not shown to be totally disabled, one reply is that no such grounds of objection was offered in the Court below when the evidence was offered. The exception then made was specific in pointing out why the evidence was not admissible, the objections being that the question was leading, that the witness was not an expert, and that the physical condition of the plaintiff below previous to the injury had not been shown. When this last ground of objection was pointed out, the witness was recalled, and it was shown by her that she

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was previously in a sound condition, on which showing the evidence was admitted. The law is, that although evidence is incompetent, the trial Court cannot be put in error in admitting it where the ground of exception is untenable. In other words, the party making the exception cannot change the ground of exception in the Appellate Court so as to put a trial Court in error. *Graham v. McReynolds*, 6 Pickle, 673, 688, 689.

But aside from the grounds of the exception to the evidence when offered below, and if the matters now insisted on had been then offered as grounds of the exception, we believe and hold that the evidence was properly admitted.

In 13 Cyc., 198, it is said: "Where the injury is such as to permanently diminish one's earning capacity, and will end only with his life or with his inability to labor on account of old age, it is clear that the expectancy of life should be considered in estimating the amount of damages sustained, and proper evidence thereof is admissible.

And why should not that be the law? It is conceded by counsel for plaintiff in error in this case that if the disability had been total the evidence would have been competent, and certainly such is the law. Yet it is insisted that when there is only partial disability, though permanent, it is not admissible. An application of this doctrine would work a strange result. It would be to say to one who has an earning capacity of \$100.00 per month and is so injured as the result of the negligence of another that that earning capacity is wholly destroyed for life that, to measure, or aid in measuring, the damages sustained, he can show his life expectancy, but to deny the same to another who has an earning capacity of \$1,000.00 per month and it is cut for the balance of his

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life to one-half that amount, or even one-tenth, as the result of the negligence of another. Yet in the case first supposed the injured party has lost only \$50.00 per month for the balance of his life, or the chance of earning it, while in the other case the loss is \$500.00 or even \$900.00 per month. No reason can exist for a rule that would work such results.

The case of *Illinois Central Railroad Co. v. Houchins* (Ky.), 1 L. R. A. (N. S.), 375, is in point. In that case there was evidence tending to show that Houchins, as the result of personal injuries, was left with a permanent limp in his walk, and that his earning capacity was permanently cut from \$1,000.00 to \$900.00 per year, and that because of a change of occupations his living expenses were made higher. Evidence of his life expectancy was held admissible, the Court saying: "When the action is to recover for the death of a person injured, as the measure of the recovery is the value of his capacity to earn money, standard tables, showing the ordinary expectancy of life, are held to be competent. Where, as in this case, there is proof tending to show that the plaintiff's capacity to earn money is impaired or partially destroyed, the probable expectancy of life is equally competent; for the measure of recovery here is in part compensation for the impairment of his capacity to earn money. If, as is conceded, evidence of the ordinary expectation of life may be received where the capacity to earn money is destroyed by death, it is hard to see why such evidence cannot be equally received where the capacity to earn money is partially destroyed, for in either case the jury are, in making up their verdict, to be governed by the capacity to earn money which has been destroyed, and whether this is a partial or total destruction is not material. *Greer v. Louisville & N. R. Co.*, 94 Ky., 169, 42 Am. St. Rep., 345, 21 S. W., 649."

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One other assignment remains to be considered, and this challenges the action of the trial Court in refusing a special request to the effect that the jury could not draw any inference against defendant below because of the fact that it had not introduced the engineer and fireman as witnesses in the case. In order to consider this assignment it is proper to make the following further statement of facts: Various witnesses of defendant below testified that where the air brakes on a car are in good condition there will be no lurching of the train after the engine stops, and that the air brakes on the train in question were in good condition. This testimony was adduced for the evident purpose of showing that the train did not lurch forward as plaintiff below and her witnesses had testified, and also especially to counteract the testimony of a witness who testified to having heard the air brakes, as he expressed it, at the same time that the lurch forward was given. Yet it was shown that the engineers sometimes took water at that point, and that frequently when a train stopped to take water it became necessary to move back a slight distance in order to get the engine at the exact proper place. None of the train crew who were examined remembered whether the engine took water on the occasion of the accident or not, but it is shown that the train stopped at the place where it would have stopped if the engine had taken water. It is also shown that the engineer was the one who controlled the matter of taking or not taking water at that point. Neither he nor the fireman were introduced as witnesses, and no reason was given or offered for not introducing them. It is also shown that counsel for plaintiff below in argument commented on the fact that the defendant had not introduced the engineer and fireman as witnesses.

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We are of opinion the Court was not in error in refusing this special request. As already indicated, the trial was had within less than a year from the date of the accident, and so far as the record discloses these employes of the railroad company were still in its service and under its control, because, as stated, there was no explanation whatever as to why they were not introduced. It is clear their evidence would have been quite pertinent if the train was not moved forward; and it is well settled law that competent and pertinent evidence within the knowledge and control of a party which he withholds is presumed to be against his interest and insistence. *Standard Oil Co. v. State*, 9 Cates, 618, 672; *Fisher Insurance Co.*, 16 Cates, 450.

We find no reversible error in the judgment of the lower Court, and it is affirmed, with costs.

OSCAR KNOX V. MEMPHIS STREET RY. CO.

Writ of certiorari denied by Supreme Court.

(*Jackson*. April Term, 1914.)

1. **ROADS AND STREETS.** *Duty to use the right side of a street not absolute under all circumstances.*

Shannon's Code, section 1600, providing that "Every driver or person having charge of any vehicle, on any turnpike or macadamized road, on meeting and passing another vehicle, shall give one-half the road by turning to the right", has no application to a situation where a road or public highway is being used by one vehicle alone; so that, in so far as the statute controls, the entire way is left to a vehicle when that way is not being used by another; and such is the common law.

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2. *SAME. Law of the road requiring the use of the right side not applicable to crossings. Due care there applicable.*

The law of the road requiring those using a public highway to turn to the right on meeting others has no application to those meeting at street crossings where each is traveling a different street. The law in that case requires each to use due care to avoid a collision.

FROM SHELBY COUNTY.

Appeal from the Circuit Court of Shelby County. Division No. 2. WALTER MALONE, Judge.

R. E. KING for Plaintiff in Error.

R. M. BARTON, JR., for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

At a street crossing in the city of Memphis a wagon in which Oscar Knox was riding was run against by one of the street cars of the Memphis Street Railway Company, and, as a result, Knox was thrown out of the wagon, and received certain personal injuries. He brought this suit to recover damages for the injuries thus inflicted on him, alleging that the motorman in charge of the street car which collided with the wagon was guilty of negligence in failing to sound the gong or give other timely notice of its approach at the street crossing, and in running the car at an excessive rate of speed, and in failing, when the accident became imminent, to do all in his power to stop the car and avert a collision. A trial before the Circuit Judge and a jury resulted in a verdict in favor of the street railway company. Knox appealed and as-

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signs errors. The assignments, four in number, go to the charge of the Court to the jury as given, and the failure of the Court to give in charge certain special requests. The determinative question is whether the driver of the wagon in which Knox was riding should be held, as a matter of law, guilty of such contributory negligence as bars a recovery, notwithstanding the negligence of the employees of the street railway company. The Circuit Judge charged the jury, in effect, that as a matter of law, if the wagon was being driven north of the center of the street in which it was proceeding when it reached the railway track there could be no recovery; and whether or not this charge, and the failure to charge special requests to the contrary were erroneous are the specific questions.

The wagon in which Knox was riding was heavily loaded, and was proceeding eastwardly on Talbot street, which street extends east and west, and which is crossed by Main street running north and south. On Main street are two tracks of the Memphis Street Railway Co. Talbot street, just west of and before its intersection with Main street, slopes downwardly at a considerable grade, so that one going eastwardly on that street to Main necessarily goes down the steep grade. Some of the evidence indicates that the team hitched to the wagon in question was unable, because of that grade, to hold back the load if driven straight ahead, and that, in order to keep the team under control, it was driven so as to "catch the slant of the hill," as plaintiff expresses it, or "zig-zag" down the grade, as others say. In any event, the team was not permitted to go straight with the street, but was caused to turn diagonally from side to side in going down. While being thus driven, it approached the street car tracks at a time it was going somewhat north of east rather than due eastward; and, according to all the evidence, it

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was north of the center of Talbot street when it reached the first or westward street car track. Whether it was simply on the north side of Talbot street and still within the bounds of that street, or whether it had gotten north of the south curb line of Talbot is a question about which the witnesses do not agree; some of the witnesses testifying that the wagon, when it reached the first street car track, was still within the limits of Talbot street, and others testifying that it was then north of the curb line of Talbot street. Be that fact as it may, it is undisputed that, after the team had passed over the first or westward street car track, and while the wagon was on that track passing over it, a street car, running from the north, collided with the wagon, with the result already stated. The evidence is also in much conflict as to whether the car was being run at an excessive rate of speed, and whether the gong was being sounded, and whether the motorman took proper precaution to avert the accident; there being evidence tending to show that the street car was being run at an excessive rate of speed, that the gong was not being sounded, and that the motorman did not take proper precautions to avert the accident after the wagon was seen to appear on the track, and evidence to the contrary on all these matters.

The portions of the charge of the Court to the jury complained of are as follows:

"The law is clear enough, and the law is that if this wagon was being driven across Main street on Talbot, and the car collided with it, the street car company is liable, because the wagon got there first, but if the wagon was turning to the north and was over on the north line of Talbot street or north of the north line either, the defendant is not liable. The law fixing the rights of parties at street crossings is nothing but plain common sense and

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justice, and people using street crossings are expected to observe the law. A person driving on Talbot street desiring to cross Main going east across Main street, the law requires him to be on the south side of Talbot street or near the south side. The law does not take notice in a matter of this kind of inches, but it was the duty of that driver of the wagon, if he was wanting to proceed across Main street on Talbot, to keep to the right of Talbot street and to drive on across the street. If he did that and the car came on and ran into him, the defendant is liable, but if he threw his wagon over to the north side of Talbot street he had no business over there, and whether he went over there intentionally or whether he permitted his team to run over to the north side, the defendant is not liable."

And, again: "Now, if this wagon was proceeding in an ordinary way across Main street, it ought to have been upon the south side of Talbot street; that is, vehicles must keep to the right of the street upon which they are driving, and if the wagon was to the middle of the street or a few inches or feet to the north of the center line of the street and was proceeding across the street when the car struck it, the defendant is liable, but as I say, if this wagon had gotten over to the north curb line of Talbot street, whether he was intending to drive up Main street or not, he had no business over there, and the defendant is not liable."

In fact, the whole charge is based on the theory that if the wagon was on the north side of the middle of Talbot street there could be no recovery, the Court in still another place in the charge saying to the jury in so many words: "If it was driving over on the north line, the defendant is not liable"; and, as indicating that such was the well-fixed opinion of the trial Judge, and not a mere

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inaccurate use of language, on the motion for a new trial he frankly admitted that, "If a man undertakes to cross Main street going east upon the north side of the street that runs east and west, that man is guilty of such contributory negligence as would bar his right to recover, whether you put it upon the law of the road or just upon ordinary common experience."

The special requests were submitted for the purpose of having the jury charged to the contrary of that given; that is, to not make liability rest solely on the question of whether or not the wagon was north of the center of Talbot street when struck by the street car. Also, there was an ordinance of the city of Memphis in evidence regulating the duty of persons turning from one street into another. One of the special requests submitted and not charged embodied this ordinance and plaintiff in error's conception of the duties of the parties under it, which request, including the ordinance, was as follows:

"I charge you that if you find from the evidence that the driver of the wagon came down Talbot street in a zig-zag, slanting, or diagonal direction, but when he reached the intersection of Main street he headed his team due east on Talbot, and was going east on said street when struck, then the city ordinance pleaded by the defendant that 'Vehicles turning to the left into another street shall pass to the right of and beyond the center of the street intersection before turning,' has no application."

No ordinance was introduced regulating the use of the streets further than the one embodied in the special request just set out.

Shannon's Code, section 1600, provides that, "Every driver or person having charge of any vehicle, on any turnpike or macadamized road, on meeting and passing another vehicle, shall give one-half of the road by turning

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to the right, so as not to interfere in passing"; which provision, we apprehend is but declaratory of what might be called the American common law on the question, and which it will be seen does not attempt to control except in cases where vehicles are "*meeting and passing*" each other; and subsequent sections attempt to control only when they are passing each other, from which it is apparent they have no application to the situation where a road or public highway is being used by one vehicle alone; so that if we should not look beyond these statutes it is clear the use of the entire way is left to a vehicle when that way is not being used by another, and such, we think, is the right of any party in using a public highway.

In 2 Elliott on Roads and Streets (3d Ed.), section 1079, it is said: "It is a general rule that one may travel upon any part of a highway not occupied at the time by another; but if he meets another traveler, whom he desires to pass, or who desires to pass him, in either direction, there are certain rights and duties which each must observe in order to avoid a collision"; in support of which proposition many cases are cited.

In *Neal v. Randall*, 98 Me., 69, 63 L. R. A., 668, in passing on the rights of parties to the use of highways under a statute to all intents and purposes the same as our own, it was said: "When no person is passing, or about to pass, in an opposite direction, one may travel upon any part of the traveled road which suits his pleasure or convenience, but when teams are approaching to meet the law requires them seasonably to turn to the right of the middle of the traveled part of the road."

Our own case of *Young v. Cowden*, 14 Pickle, 577, 40 S. W., 1088, is substantially to the same effect. In that case a party was driving along an avenue in the city of Memphis in a rockaway, and when coming to a point

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opposite a gate leading into premises belonging to one of the occupants of the rockaway, it was stopped on the left side of the avenue to wait until the gate was opened that it might be driven in. It was so turned that it and the horse occupied the whole of the left side of the avenue. While the horse and the vehicle were thus occupying the left half of the avenue, the defendant drove into the rockaway, damaging it and throwing the occupants out. For the injuries thus inflicted on one of the occupants suit was brought. In that case the defendant, it appears, contended, in effect, that the rockaway had no right, under any circumstances, to occupy the left side of the road, and could be deliberately run into, just as the trial Court charged the jury in the instant case. On this contention, and construing our statutes governing the use of the public highway, particularly Shannon's Code, sections 1601, 1603 and 1605, our Supreme Court said:

"Now, if defendant's contention is correct, and the statute must be literally construed and strictly enforced, it means that a party innocently occupying the left-hand side of the road for a legitimate purpose, may be run into and injured by a party behind him, although there is sufficient space on the right side of the road for the hindmost party to pass. Even if plaintiff was violating the law contended for, this was no excuse for the defendant to drive into the rockaway and turn it over and injure the plaintiff. *O'Malley v. Dorn*, 73 Am. Dec., 405, and note. It is well recognized in the law of the road that a driver may occupy any part of the road which will not obstruct or interfere with the rights of others driving on the highway. 12 Am. & Eng. Enc. L., 957-961, note 4; *O'Malley v. Dorn*, 73 Am. Dec., 407, note.

"The Court said that when the movement of the vehicle in front indicated the intention of the driver to use an-

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other part of the road which he was not then using, the driver of the vehicle in the rear must govern his vehicle accordingly; that the driver should have his horse and vehicle under such usual, ordinary and reasonable control as to be able to stop and prevent a collision. This was a correct and proper instruction. *Avegno v. Hart*, 13 Am. Rep., 135, note."

See to the same effect 2 Elliott on Roads and Streets (3d Ed.), section 1082; 37 Cyc., 271.

Again, and still more to the point than either of the propositions just considered, the case under consideration, according to practically all the testimony offered on both sides, is not one where two vehicles were meeting on a public highway, each going in an opposite direction, nor was it a case of one passing the other when both are going in the same direction, nor the case of one standing in or obstructing the public highway, but a case of each going on a different street and a collision occurring at a crossing. Our statutes do not apply to that situation, nor does the city ordinance in question, that applying, not to cases of such meetings at crossings, but when a vehicle turns from one street into another; nor does the law of the road according to the authorities apply. The law in such case, as laid down in 37 Cyc., 272, is that, "The law of the road requiring turning to the right does not apply to persons meeting at cross streets, but each must use due care." 2 Elliott on Roads and Streets (2d Ed.), section 1081, announces the same rule. This, it is apparent, must be the proper rule, for who shall say that in such event either shall arbitrarily turn to the right or left? And what reason exists for any one so saying?

We think in any view of the case it is too clear for further elaboration that the trial Court was in error in assuming that plaintiff Knox was guilty of negligence in driving

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to the north of the center of Talbot street. Under the authorities, if that street was not being used by another, and if, as a matter of convenience or necessity, he passed to the north of the center line, he was certainly not guilty of negligence as a matter of law, even if he had been meeting another, much less under the actual facts; and, if guilty of negligence at all, it was a question for the jury as to whether the negligence was such as barred a recovery. Further, if Knox was guilty of negligence the defendant was not authorized to fail to take any steps to avert a collision, but, on the contrary, it was its duty to use all reasonable efforts to avoid such result.

That the street car employes did see the wagon approaching the crossing in time to take measures to avert the accident is not disputed, and that the wagon got to the crossing first, and was entitled to the right of way, there was evidence tending to establish; and that, regardless of this, the street car was run negligently and carelessly against the wagon, there was evidence tending to show; so, clearly the case was one for the jury, and the instructions given were erroneous and highly prejudicial to plaintiff, being inconsistent with the law, as we have shown; and the result is the judgment of the lower Court is reversed, and the case is remanded, and plaintiff in error is taxed with the costs of this appeal.

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E. T. MORGAN, ET AL., v. CINCINNATI, NEW ORLEANS &
TEXAS PACIFIC RAILWAY COMPANY, ET AL.

Rehearing granted and Court of Civil Appeals affirmed
by the Supreme Court.

(Knoxville. September Term, 1913.)

1. COMMON CARRIERS. *Cannot discriminate between shippers.*

Neither under the common law nor under the Interstate Commerce Act of 1887, section 3, can a common carrier discriminate between shippers who offer goods not unfit for shipment, at proper places and proper times, and who tender the cost of carriage.

2. SAME. *Same. Applicable to furnishing facilities on existing sidetracks.*

In like manner, where sidetracks and spur tracks already exist, and where facilities are being furnished thereon to some shippers, there can be no discrimination against others in the matter of furnishing cars thereon to them.

3. STATE COURTS, JURISDICTION OF. *Rights created and regulated by federal statutes may be enforced in.*

The laws of the United States are laws in the several states, as binding on the citizens and courts thereof as the state laws are, and rights created by federal statutes may be enforced in the state courts unless exclusive jurisdiction be expressly or by necessary implication conferred on the federal courts. In the absence of such exclusive jurisdiction being conferred the state and federal courts have concurrent jurisdiction.

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4. CHANCERY COURTS OF TENNESSEE. *Jurisdiction of to enjoin discriminations by carriers, interstate or intrastate.*

Chancery Courts of Tennessee have jurisdiction to enjoin illegal discriminations by common carriers, whether they are engaged in interstate or intrastate business.

FROM RHEA COUNTY.

Appeal from the Chancery Court of Rhea County.
V. C. ALLEN, Chancellor.

MILLER & SWAFFORD for Complainants.

WRIGHT & HAGGARD, B. G. MCKENZIE and W. L. GIVENS for Defendants.

MR. JUSTICE HUGHES delivered the opinion of the Court.

COMPLAINANTS, E. T. Morgan, J. F. Morgan and G. D. Morgan, by their original bill in this cause, filed against the Cincinnati, New Orleans & Texas Pacific Railway Company, the Dayton Milling Company, and W. H. Jones, seek, by injunction, to restrain the defendant railway company, a common carrier, from discriminating against complainants and in favor of the other two defendants in the matter of furnishing shipping facilities, and to require, by mandatory injunction, the railway company to accord to complainants facilities equal to those accorded to the railway company's co-defendants; and they also seek to recover from all the defendants damages alleged to have resulted to them from certain discriminations complained of. Each of the defendants filed a separate demurrer, and all the demurrers were overruled by the Chancellor. De-

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fendants prayed and were granted an appeal from that action of the Chancellor; and the cause is before this Court on bill and demurrers.

The material allegations of the bill, which, of course, must be taken as true on this hearing, are that the defendant railway company is a common carrier of passengers and freight, operating a line of railroad extending from Cincinnati, Ohio, through the city of Dayton, in Rhea County, Tennessee, to Chattanooga, Tennessee; that it has, as a part of its duties, erected along its line of road various side tracks and spur tracks for the accommodation of manufacturing plants, mills, coal yards, etc., on which it runs its locomotives and cars in handling freight; that complainants own certain realty situated in Dayton and adjacent to the defendant railway company's line of railroad, and fronting on its right of way 200 feet; that at the time complainants purchased this property, more than fifteen years before the filing of the bill, there was a building on it which had, preceding the said purchase by complainants, been used as a foundry, and that there was also a spur track leading from the main line of the defendant railway company's road and extending on and along its right of way the entire frontage of complainants' property; that this spur track had been built and used by defendant railway company for the purpose of delivering cars loaded with material for the foundry, and also in loading cars with materials to be shipped therefrom; that after complainants made their purchase of the property it was leased by them for cold storage purposes, and cars were furnished by the railway company on this spur track for the accommodation of the lessees; that this lease lasted for about five years, during which time the spur track was thus used; that after that time the property was leased for saw mill and planing mill purposes

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for a number of years, during which time the spur track was also used for the convenience of the lessees; that after that lease expired, and about the year 1908, the property was again leased and used for cold storage purposes, and the spur track again used as before until about the year 1909, when the defendant railway company tore up and removed about 160 feet of the spur track extending along by the property of complainants, leaving only about forty feet still extending in front of their property, which it is alleged was done without their knowledge or consent. It is then alleged that the Dayton Milling Co., a corporation, is the owner of a piece or parcel of real estate adjoining complainants' realty on the north and also fronting on the right of way of the railway company about 300 feet; that the milling company purchased this property and erected a building thereon after complainants acquired their property; that after the erection of this building by the Dayton Milling Company, the point of intersection of the spur track with the main track, which was north of complainants' property, was so changed as to make the spur track extend by the milling company's property in such manner as to accommodate shipments to and from that plant; and it is then alleged that about July, 1910, the occupant of complainants' property, who was complainant G. D. Morgan, "opened up a coal business" on the northern end of that property in front of which the forty feet of spur track not taken up extended, and began the business of buying coal in carload lots and selling to the retail trade, and that on a later date complainant G. D. Morgan entered into the business of hay and grain dealer in the same building, buying hay and grain in carload lots and selling to the retail trade; that coal, and hay, and grain were received over defendant railway company's road in carload lots by cars being placed on

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the spur track in front of complainants' property; that soon after complainant G. D. Morgan embarked in the business of dealing in coal, the Dayton Milling Company also opened up a coal yard on its property, and began buying coal in carload lots, and that soon after he embarked in the hay and grain business an occupant of the Dayton Milling Company's property, part of which had in the meantime been leased, also entered that business; that cars were placed for G. D. Morgan's rivals on the spur track in front of the milling company's property, but that since the rivalries in these enterprises had arisen the defendant railway company began discriminating against G. D. Morgan and in favor of his rivals, by so placing cars that complainant's rivals could unload directly into their coal yard and hay and grain warehouse, whereas it had been placing empty cars and cars loaded for others than G. D. Morgan on the spur track in front of complainants' property in such manner as to make the handling of freight intended for business done on it inconvenient, and has been refusing to place cars loaded with freight to be delivered on the spur track in front thereof, and in so doing has given an undue advantage to those doing business in and on the property of the Dayton Milling Company over G. D. Morgan and on complainants' property. It is alleged that the defendant railway company refuses on demand to place cars loaded with freight for G. D. Morgan in front of complainants' property, although requested to do so—that, instead of placing such cars on the spur track immediately in front of complainants' property, it places them on another spur track located between the spur track running immediately in front of the property and the main track, and that because of being so placed, complainant G. D. Morgan is compelled to unload cars so placed into wagons and haul the con-

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tents to his coal yard and place of storing hay and grain, while his rival is not thus treated, but is favored as already indicated. This conduct, it is alleged, is being indulged in almost daily and is operating to the prejudice and great injury of complainants. It is alleged that the defendants, Dayton Milling Company and W. H. Jones, who is alleged to be its lessor in the coal business as a rival of complainants G. D. Morgan, have induced the unlawful conduct of the railway company in its discriminations against the business of G. D. Morgan and against the property of the other complainants; that the conduct of the railway company is the result of a confederation or agreement between it and its co-defendants, and that because of such confederation or agreement all the defendants are liable to the complainants for the damages which have already accrued as a result of the conduct complained of, which damages it is alleged are great. Complainants allege that the business done by G. D. Morgan is as extensive as that done by his rivals if not more extensive than theirs.

It is also alleged that a few months before the bill was filed, complainants and the defendant railway company entered into an agreement by which the railway company was to relay part of the track in front of complainants' property which had been taken up; that pursuant to such agreement a survey was made by the railway company and a blue print prepared and furnished to complainants, showing the location of the new track to be laid, 105 feet in length, and that an estimate of the cost of relaying the track was likewise furnished them, which cost, under the agreement, complainants were to pay in consideration of the relaying of that part of the spur track, but that this agreement had not been carried out by the railway company; that on the contrary, complainants had been notified

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by the railway company that it would not carry out said agreement. It is alleged that complainants are still ready and willing to pay for the relaying of the 105 feet of additional spur trackage or so much thereof as may be necessary to accommodate their property and business.

The prayer of the bill is for an injunction restraining the railway company from discriminating against complainants and in favor of defendant Jones in the use of the spur track in question; that a mandatory injunction issue requiring the railway company to accord to complainants the same privileges it has been granting to defendants Dayton Milling Company and Jones in the use of the spur track, and that the railway company be required to relay and rebuild that portion of the spur track taken up and which formerly ran in front of complainants' property, and for a recovery of the damages that have resulted to complainants because of the discriminations already practiced.

The questions made by the demurrer, and which are passed in argument before this Court, are two: First, that the bill fails to allege any cause of action; and, second, that the matters complained of are not matters over which a Court of Chancery of the State of Tennessee has jurisdiction; all of which matters being, it is contended, exclusively within the jurisdiction of the Interstate Commerce Commission and the Federal Courts, for the reason that the Interstate Commerce Act of 1887 and its various amendments cover and regulate the duty of defendants in the entire matters complained of, and furnish the exclusive remedy for a violation of such duty or duties.

That common carriers, even under the common law, must not discriminate between shippers who offer goods not unfit for shipment, at proper places and proper times, and who tender the cost of carriage, is well settled—in

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fact, so well settled as to not require more than an announcement of the proposition and a citation of our own case of *New Publishing Co. v. Southern Railway Co.*, 2 Cates, 684, 75 S. W., 941, 63 L. R. A., 150.

The Interstate Commerce Act of 1887, section 3, also provides as follows:

“That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect, whatever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

Yet it cannot be said to be settled beyond question that granting equal facilities in the use of side tracks or spur tracks to all shippers comes under this rule, though it appears that under some circumstances the Interstate Commerce Law would require such. By the amendment of the Interstate Commerce Act of 1887, passed in 1906, it is provided as follows:

“Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in

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favor of or against any such shipper." Judson on Interstate Commerce (2d Ed.), page 217.

See a discussion of this question in sections 158 and 262 of Judson on Interstate Commerce (2d Ed.).

In 4 Elliott on Railroads (2d Ed.), section 1678, it is said: "The English rule is that granting the use of side tracks to some shippers and denying the use of them to others is an unjust discrimination, and this is doubtless the rule under the Federal statutes in cases where the circumstances and conditions are not substantially dissimilar." And at section 1468 of the same volume is found this: "It is, we think, safe to say that the rule is that a railroad carrier, so far as concerns the receipt and transportation of goods, however it may be as to rates of freight, must, where the conditions and circumstances are identical, treat all shippers alike." So it would appear where a side track or spur track already exists, as in the case under consideration, and where facilities are furnished to some shippers, discriminations are illegal, and this Court so holds.

As to the question of the jurisdiction of a Chancery Court of Tennessee to grant the relief sought, we think the law well settled. In the first place, the Interstate Commerce Acts of 1887, in sections 7, expressly provides, "that the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid," and it does not appear from the original bill in this case that any of the discriminations complained of have been in regard to shipments beyond the State of Tennessee, or that any future shipments are intended to go beyond the State limits; but regardless of that feature of the case, and if

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it be conceded that the whole subject matter is governed by the Interstate Commerce Law, it by no means follows that the State Courts are without jurisdiction. In *Judson on Interstate Commerce* (2d Ed.), section 48, it is said:

"As the laws enacted by Congress in its regulations of interstate commerce are the laws in the several States, rights created thereby may be enforced in the State Courts in the absence of exclusive legislation vested in Congress; and the judgments of the State Courts in the enforcement of said rights are subject to review by the Supreme Court when a Federal right, duly asserted, is denied through the appellate jurisdiction of the Supreme Court over the State Courts under the Judiciary Act."

This announcement is in part in almost the language of the Supreme Court of the United States in the case of *Clafin v. Houseman*, 93 U. S., 130, 23 L. Ed., 833, which involved the right of an assignee in bankruptcy under the Bankrupt Act of 1867 to maintain suit as such assignee for the purpose of enforcing certain rights given him by the Federal statute, and which contains a very valuable discussion of the question now under consideration. It was said, in speaking of enforcing rights under a Federal statute, in that case that, "where jurisdiction may be conferred on the United States Court, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither express nor implied, the State Courts have concurrent jurisdiction wherever, by their own construction, they are competent to take it."

This holding in the *Clafin-Houseman* case has been approved in the later case of *Mondou v. N. Y. & N. H. R. Co.*, 223 U. S., 1, 57, 56 L. Ed., 327, 349, decided in 1911. In that case, quoting approvingly from the *Clafin* case, it is said:

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"The laws of the United States are laws in the several States and just as much binding on the citizens and Courts thereof as the State laws are. The United States is not a foreign sovereignty, as regards the several States, but is a concurrent, and, within its jurisdiction, paramount, sovereignty. . . . If an Act of Congress gives a penalty (meaning civil and remedial) to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some Act of Congress, by a proper action in a State Court. The fact that a State Court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the Courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as Courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Albeman v. Booth*, 21 How., 506, 16 L. Ed., 169; and hence the State Courts have no power to revise the action of the Federal Courts, nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the State Courts should not be open for the prosecution of other rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

The *Mondou* case is also, by virtue of its own holding, authority in support of the jurisdiction of the State Courts

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in the case at bar; it being held in that case that the concurrent jurisdiction provision of the Judiciary Act of August 13, 1888, which gives to the Circuit Courts of the United States cognizance concurrent with the Courts of the several States of all suits of a civil nature at common law or in equity, lends aid to the idea of the State Courts having jurisdiction unless Federal statutes expressly provide otherwise. No provisions of the Interstate Commerce Act providing otherwise is found.

As to the cases of *Southern Railway Co. v. Reid*, 222 U. S., 424, and 222 U. S., 444, and *Northern Pacific Railway Co. v. State of Washington*, 222 U. S., 370, relied on by defendants in support of the proposition that the State Courts are without jurisdiction, we can say that we have carefully examined them and find that they do not pass on the question now at issue. In the two Reid cases the question involved was a question of the validity of a statute of North Carolina regulating interstate commerce, and in the case of *Northern Pacific Railway Co. v. State of Washington* in like manner the question involved was the validity of a State statute controlling interstate commerce; and the holdings in all these cases are simply to the effect that where Congress has legislated on a question of Federal control a State statute attempting to regulate the same question is invalid. These cases in no way involve the jurisdiction of Courts.

Clearly the action of the Chancellor in overruling the demurrers was correct, and the case is remanded for further proceedings. Defendants will pay the costs of this Court.

S ——— v. S ———

MRS. S ——— v. MR. S ———.

Writ of certiorari denied by the Supreme Court.

(*Nashville*. December Term, 1913.)

1. DIVORCE. *Abnormal sexual habits as grounds for.*

For a husband to refuse to consummate the marriage by normal sexual intercourse with his wife when she is willing, and for him to indulge in abnormal sexual habits with her and in her presence, is to be guilty of "such cruel and inhuman treatment or conduct toward his wife as renders it unsafe or improper for her to cohabit with him, and be under his dominion and control"; and when he has been guilty of such conduct toward his wife he has "offered such indignities to her person as to render her condition intolerable, and thereby forced her to withdraw"; and a divorce from the bonds of matrimony will be granted to her because thereof.

2. COURTS. *Duty of with reference to litigations.*

It is the duty of courts to pass on cases as presented to them, and administer the law under the facts as it finds them, regardless of incidental results, such as that it may cast odium on a litigant.

FROM DAVIDSON COUNTY.

Appeal from the Chancery Court of Davidson County.
JOHN ALLISON, Chancellor.

JOHN W. GAINES and JOHN W. GAINES, JR., for Complainant.

NORMAN FARRELL, JR., and E. J. SMITH for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

S — v. S —

By her original and amended bills, complainant seeks a divorce from defendant on the grounds that he had been guilty of such cruel and inhuman treatment toward her as rendered it unsafe and improper for her to cohabit with him and be under his dominion and control, and that he had offered such indignities to her person as to render her condition intolerable and thereby forced her to withdraw (Shannon's Code, section 4202, subsections 1 and 2); setting out in her amended bill in detail his acts which she alleges constituted the cruel and inhuman treatment and indignities. Defendant answered the original and amended bills, denying the allegations of fact; and, on a hearing before the Chancellor, both sides introducing evidence, complainant's bill was dismissed; the Chancellor announcing that the evidence was "as equally balanced on the material facts alleged and denied as any case" he had ever heard, and that the burden of proof being on complainant, she had failed to make out her case.

The matters complained of, and because of which it is sought to have the bonds of matrimony dissolved, pertain to the sexual relations of complainant and her husband; and in order to present the controversies with reference thereto, together with the conflicts of evidence thereon, it will be necessary to go into the charges and the testimony somewhat in detail, though we will do this as briefly as is consistent with an intelligent presentation of the case, and in language as clear as it is possible to use and yet present the case.

Complainant and defendant were married in Nashville, Tennessee, on July 30, 1912, and complainant left her husband on August 24, 1912, or within less than one month from the date of the marriage. The original bill was filed September 17, 1912, or in a little more than one and one-half months from the date of the marriage.

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The case was heard before the Chancellor in June, 1913, or within less than one year from the time the parties were married. At the time of the marriage, it appears, complainant was about, perhaps a little more than, nineteen years old, as she appears to have been twenty at the time of the trial before the Chancellor. Defendant, it is shown, was not quite twenty-three years old at the time of the marriage. The marriage ceremony was performed a little after eight o'clock in the evening, and immediately complainant and defendant embarked on their bridal tour. They took a sleeper from Nashville to Washington, D. C., at nine-thirty, and spent two nights on the sleeper, and the next two nights in the city of Washington. From there they went to Atlantic City, where they spent perhaps two days and nights; and from Atlantic City they went to New York, where they spent a day and night, or something like that; and from there they went back to Nashville, reaching Nashville on the morning of August 8th. They then stayed at the home of defendant's parents until complainant left her husband on the forenoon of August 24th.

Complainant alleges in her bill and amended bill, and testifies as a witness, that during all this time her husband neither had nor attempted to have sexual relations with her in a normal manner, notwithstanding the fact, as she alleges and swears, she was willing to consummate the marriage by normal sexual intercourse. She says that, beginning with the first night on the sleeper, her husband, without any request or offer to have normal sexual relations with her, but by pressing and rubbing against her back and hips and between her thighs, would produce emissions. As already indicated, she says this occurred on the first night—that on that night it was not so frequent, but that thereafter it became more frequent

and more annoying; and that at one time, while in the city of Washington, he got up from her bed, and, as appeared to her from the dim light in the room, he was guilty of masturbation. She says that his practices fouled her person and gowns to that extent that on getting back to Nashville, in order to protect herself and her gowns from his filthy and unnatural habits, she put napkins on the outside of her gowns and around her hips, and that these were fouled in the same manner.

Defendant denies in his answer and as a witness, that he was guilty of any of these unnatural practices. He says that he desired and sought normal sexual relations with his wife, but that for one reason and another she put him off, except on one occasion, till the separation.

Thus far, and in the absence of other testimony, it would be very difficult to tell where the preponderance of the evidence lies, the complainant swearing positively to a state of facts which is denied with equal positiveness by the defendant; and if we were left to rely on the testimony of these two alone, we think it clear that complainant, having the burden of proof, would necessarily fail in her case. But there is other evidence on both sides, and we will now consider the question of corroboration of each.

(In a memorandum opinion filed with the record, the Court reviews and discusses fully the evidence offered on both sides, including the testimony of physicians offered by both, but this part of the opinion is necessarily a discussion of matters not appropriate for publication; and, it also not being necessary to set this part of the opinion out here in order to present the legal question involved, it is omitted. After reviewing the evidence, the Court continues as follows):

It is insisted on behalf of defendant that to find the facts with complainant's contention is to, in effect, find

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her husband guilty of odious and repulsive practices. While this may, in a sense, be correct, this Court, as is true of all Courts, has imposed on it the duty of passing on the case as it is presented. The oath the members of this Court have taken requires it, the law requires it, and a sense of public duty makes it imperative. While the acts alleged to defendant are of a nature to influence the Court to hesitate to believe he could be guilty of them, yet if the evidence is such as to force a conclusion adverse to him, the odium it may cast on him is but an incident, and the Court is not responsible for the results, however much it may regret them. It must administer the law under the facts as it finds them.

For the reasons set out we are of opinion that complainant has made out her case, not only by a preponderance of the testimony, but by an overwhelming weight of it, such as to force irresistibly the conclusion that her contentions are correct; and we so find.

The question then arises, under the evidence, is complainant entitled to a divorce? And in view of our statutes we think this question hardly debatable. By Shannon's Code, section 4202, subsection 1, it is provided that "such cruel and inhuman treatment or conduct toward his wife, as renders it unsafe or improper for her to cohabit with him, and be under his dominion and control"; and by subsection 2, "That he has offered such indignities to her person as to render her condition intolerable and thereby forced her to withdraw," are grounds of divorce from bed and board or from the bonds of matrimony in the discretion of the Court; and we think the conduct of defendant toward his wife can well be treated as such cruel and inhuman treatment as renders it unsafe and improper for her to cohabit with him and be under his dominion and control; and we think it can hardly be questioned that it

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amounts to such indignities to her person as to render her condition intolerable and force her to withdraw. Physicians testify that such conduct of a husband toward his wife is calculated to make her so nervous as to undermine her health; and the evidence in this case establishes beyond question that defendant's conduct toward complainant was having that effect at the time she left him. According to the testimony of two lady witnesses, when complainant would relate to them her husband's conduct toward her, which she did repeatedly while she lived with him in Nashville, she was crying, and on some of the occasions was hysterical; and such is described as her condition on the day she left him.

We deem but brief references to authorities necessary.

In the case of *Payne v. Payne*, 4 Humph., 500, it appeared that a husband had threatened to drive his wife from his home; had used such language to her as was unusual to address to slaves; had slapped and choked her, and at the family altar had prayed the Lord to deliver him from her in whatever way he might think best. Of this conduct, our Supreme Court said his prayer was "infinitely the greatest indignity of them all"; and, summing up its conclusion, it said:

"He is in the habit of using language to her which a gentleman will not employ to his slaves; he threatens to drive her from his house; he slaps and chokes her; and, at the family altar, in her presence, he prays God to deliver him from her. We think she would ill deserve the character of refinement, sensibility and lady-like feeling, which the witnesses give her, if she did not feel that to remain in his house and endure all this was intolerable."

See also *Gardner v. Gardner*, 20 Pickle, 410, where it was held that for a husband to subject his wife, a woman of delicate health, to abnormal sexual intercourse in vio-

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lation of the laws of nature and decency and to the serious impairment of her health, was such cruel and inhuman treatment as justified the granting of a divorce. We are of opinion that the case at bar presents an even stronger case, as the conduct of the husband here was loathsome, filthy and exceedingly offensive, and was not only calculated to affect, but was actually seriously affecting, the health of his wife when she left him, as all the testimony indicates.

The result is, the decree of the Chancellor is reversed, and a decree will be entered here granting a divorce to complainant and restoring her to her maiden name, according to the prayer of her bill; and defendant will be taxed with the costs, including \$100.00 to be paid complainant's counsel, this being granted, not as a full measure of their fees, but because, as defendant is shown to be a young man, strong and able to work, and making \$60.00 per month, it is but right that he should bear that much of the burden assumed by complainant in this action for a legal separation.

W. G. LENOIR v. C. C. CANNON, ET AL.

Writ of certiorari denied by the Supreme Court.

(*Knoxville*. September Term, 1913.)

1. NEGOTIABLE INSTRUMENTS. *Surety on primarily liable.*

Under the Negotiable Instruments Law (Acts 1899, Chap. 94), providing that "The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same", and that "All other persons are

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secondarily liable", one signing a negotiable note on its face, although he may attach the word surety or the abbreviation "sec." to his name, is primarily liable.

2. **SAME.** *Same. Discharged only by that that will discharge the note.*

A party so signing his name on the face of the note along with another signing as principal, though as between themselves one may be the surety of the other, as to the payee they are both principals, and only that that will discharge the one will discharge the other—that is, only that that will discharge the note will discharge either.

3. **SAME.** *Same. Same. Case in judgment.*

Where one a principal, as between him and his surety, on a negotiable note, puts up a solvent collateral note as additional security and is permitted later, by the payee of the secured note and without the assent of the surety, to apply the proceeds of the collateral to other matters, the surety on the note, to further secure which the collateral was put up, is not discharged, either wholly or to the extent to which the proceeds of the collateral note have been applied to other purposes, for the reason that he, as to the payee in that note, is a principal, and can be discharged only by those things that will discharge the note, and such diversion of the proceeds of the collateral does not discharge the note.

FROM LOUDON COUNTY.

Appealed from the Chancery Court of Loudon County.
HUGH KYLE, Chancellor.

GREEN, WEBB & TATE and JNO. J. BLAIR for Complainant.

D. C. YOUNG for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

Lenoir v. Cannon.

W. G. LENOIR was surety on a note for \$5,500 executed by his brother, H. L. Lenoir, payable to the order of Bank of Sweetwater, and the bank held as collateral or additional security to that obligation another note for \$5,000 which C. C. Cannon had executed to H. L. Lenoir, and which H. L. Lenoir had put up as collateral. Cannon, the maker of the collateral note, was solvent, and the bank could have insisted on the payment of the entire amount of the collateral note to it and applied the proceeds to the payment of the note which it held and which was secured by W. G. Lenoir. However, it consented, without the assent of W. G. Lenoir, to the payment of part of the collateral note to H. L. Lenoir, or that it be applied on his obligation other than on the \$5,500 it was held to secure, and as a result the \$5,000 collateral note has been fully paid and \$3,000 of the \$5,000 note still remains unpaid. W. G. Lenoir, the surety on the \$5,500 note, seeks by an amended bill filed in this case to be released from further obligation on the \$3,000 remaining unpaid, or in the alternative, he asks that, as between him and the bank, the bank be held liable for the amount it permitted diverted to other purposes rather than payment on the \$5,500 note. The Chancellor refused this relief, and complainant W. G. Lenoir appealed to this Court, and has assigned that action of the Chancellor as error.

Aside from and independent of other matters pressed by counsel in oral arguments at the bar of this Court and in briefs, we think the decree of the Chancellor was proper and should be affirmed because of the application of certain provisions of our Negotiable Instruments Law to the facts of this case. The note now held by the Bank of Sweetwater and which complainant W. G. Lenoir insists he should be discharged from because of the acts of the

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bank in permitting the collateral applied to other purposes, or which he insists should be credited, as between him and the bank, with the amount so applied to other purposes, is as follows:

"\$3,000.00.

SWEETWATER, TENN., Sept. 19, 1910.

"Ninety days after date we promise to pay to the order of Bank of Sweetwater . . . three thousand and no-100 dollars.

"At the Bank of Sweetwater, Sweetwater, Tennessee, for value received, with ten per cent attorneys' fees, if collected by law. The makers and endorsers of this note hereby severally waive presentment for payment, notice of non-payment and protest, and consent that the time of payment may be extended without notice thereof.

(Signed) "H. L. LENOIR,

(Signed) "W. G. LENOIR, *Sec.*"

By Act 1899, chapter 94, known as our Negotiable Instruments Law, it is provided in the general provision of the Act that, "The person primarily liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other persons are secondarily liable." By section 119 of this Act it is provided:

"A negotiable instrument is discharged:

"1. By payment in due course, by or on behalf of the principal debtor;

"2. By payment in due course by the party accommodated where the instrument is made or accepted for accommodation;

"3. By the intentional cancellation thereof by the holder;

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"4. By any other act which will discharge a simple contract for the payment of money;

"5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

By section 120 of this Act it is provided:

"A person secondarily liable on the instrument is discharged:

"1. By any act which discharges the instrument;

"2. By the intentional cancellation of his signature by the holder;

"3. By the discharge of a prior party;

"4. By a valid tender of payment made by a prior party;

"5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

"6. By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

In the case of *Bank v. Hood*, 18 Cates, 443, it was held that, by the language of the general provisions of this Act of 1899 hereinbefore quoted in defining who is a person primarily liable, it was meant one who had signed on the face of the instrument, and not one who had signed an undertaking or obligation appearing elsewhere, as on the back of the note; and, applying that holding, it was there further held that the endorser of a note as distinguished from one who had signed it on its face, was not primarily liable; and the reasoning of the Court in that case leads to the irresistible conclusion that one signing a negotiable note on its face, although he may attach the

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word surety or the abbreviation "Sec." to his name, is primarily liable. This construction of the statute would make both H. L. Lenoir and W. G. Lenoir parties primarily liable on the note in question, and this being true, the provisions of the Negotiable Instruments Law relative to the discharge of one secondarily liable would not apply to W. G. Lenoir. He being primarily liable with H. L. Lenoir, could be discharged only by that that would discharge the note itself; and it is not, and could not be, pretended that the acts relied on as a discharge of W. G. Lenoir would discharge the instrument.

This view of the law is in accord with the holding of the Supreme Court of North Carolina in the late case of *Rouse v. Wooten*, 140 N. C., 557, 111 Am. St. Rep., 875, where this precise question was considered in an able opinion going somewhat exhaustively into the authorities. It was there pointed out that where two parties are both primarily liable on a note under the Negotiable Instrument Law, though as between themselves one might be the surety of the other, as to the payee of the note "they are joint debtors fixed with the same obligations, and what discharges one discharges the other, and nothing less"—that is, the note itself must be discharged.

We are, therefore, of opinion the decree of the Chancellor dismissing complainant's bill and amended bill was and is correct, and it is affirmed, and complainant is taxed with the costs.

Sprankle v. Meyernick.

B. H. SPRANKLE v. CHARLES MEYERNICK.

Writ of certiorari denied by the Supreme Court.

(Knoxville. September Term, 1913.)

1. **MOTION FOR DIRECTED VERDICT.** *Effect of as to taking case from jury or vice versa.*

The making of a motion for a directed verdict, unlike a demurrer to evidence, does not take a case from the jury; but is only a submission to the judge of the question whether the case shall be withdrawn, or, differently expressed, whether the jury shall be required peremptorily to render a verdict for the party making the motion.

2. **NONSUIT.** *Motion for not too late after motion for directed verdict and before direction given.*

Under Shannon's Code, section 4689, providing that "The plaintiff may, at any time before the jury retires, take a nonsuit, or dismiss his action as to any one or more defendants", a motion for nonsuit does not come too late if made after a motion has been made for a directed verdict, and before that motion has been fully disposed of.

FROM KNOX COUNTY.

Appeal from the Circuit Court of Knox County. Von
A. HUFFAKER, Judge.

CHAS. S. SMITH and A. C. GRIMM for Plaintiff.

BURROWS & HODGES for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

Sprankle v. Meyernick.

CHARLES MEYERNICK brought this suit in the Circuit Court of Knox County to recover damages for personal injuries received while he was in an elevator in what is known as the National Building; alleging, as the basis of his right of recovery, that plaintiff in error, B. H. Sprankle, was the owner of the building, and was having the elevator therein operated for the use of its tenants and the public generally, and that while it was thus being operated, Sprankle carelessly and negligently permitted it to become and be out of repair, and that by virtue thereof the cable broke while the cage was ascending in the shaft, and he, Meyernick, was injured. Issue was taken on the declaration, and the case went to trial before the Circuit Judge and a jury, and, after all the evidence on both sides had been heard, a motion was made on behalf of Mr. Sprankle to have the jury directed to return a verdict in his favor. The trial Court, after hearing arguments on the motion, overruled it on all grounds on which it was based except one, which was to the effect that plaintiff below had failed to introduce any evidence showing or tending to show that Mr. Sprankle was the owner of the National Building, or that he was in any way connected with, or responsible for, the condition of the elevator therein. As to this ground of the motion the Court withheld action until the next day, stating that he wanted his memory refreshed by the stenographer who had taken down the evidence, as to what the evidence was on that point. On making that statement the trial Court further announced that he would permit the case argued to the jury on the day the motion was made so as to save time; and, pursuant to this announcement, one attorney representing plaintiff below proceeded to argue the case to the jury, after which two attorneys representing defendant below argued the defendant's side of the case, "at the con-

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clusion of which third argument," to quote from the minute entries, "and before the closing argument had been made by plaintiff's attorney, the plaintiff moved the Court to be allowed to take a voluntary nonsuit." The record further recites that when this occurred, "The Court stated that he was of the opinion that plaintiff was entitled to take a nonsuit and plaintiff's motion was, therefore, allowed and the jury discharged, and the adjournment hour having been reached, Court was adjourned until nine o'clock A.M., June 25th."

It is further shown by the record that when Court met on the next morning defendant "excepted to the action of the trial Judge in allowing plaintiff to take a nonsuit," and that after the Court had sustained his action of the previous morning, defendant further "moved the Court then and there to pass on his motion for peremptory instructions upon the ground on which the Court had reserved his decision, which motion the Court declined because plaintiff had already been allowed to take a nonsuit and the case was no longer before the Court." Defendant below appealed from this action of the Court in permitting the nonsuit, and has assigned errors in this Court.

It is most earnestly insisted in the briefs of counsel for plaintiff in error, as it was in oral argument at the bar of this Court, that the motion to take a nonsuit came too late, in that it was made after the motion to direct a verdict had been made; the contention being that a motion to direct a verdict has the effect of taking the case from the jury, and that under our statutes, when the case is thus taken from the jury it is too late to make the motion to take a nonsuit. The provisions of Shannon's Code, sections 4689 to 4691, inclusive, as they are construed in the case of *Railroad v. Sansom*, 5 Cates, 683, 84 S. W., 615, and the holding in that case are specially relied on. The statutory provisions thus relied on are as follows:

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"4689. *Nonsuit before jury retires; but defendant may elect to proceed on set-off.* The plaintiff may, at any time before the jury retires, take a nonsuit or dismiss his action as to any one or more defendants, but if the defendant has pleaded a set-off or counter claim, he may elect to proceed on such counted claim in the capacity of a plaintiff.

"4690. *Defendant may withdraw set-off.* The defendant may, in like manner, withdraw his counter claim at any time before the jury retires to consider of their verdict.

"4691. *In trials by Court, nonsuit before cause finally submitted.* If the trial is by the Court instead of the jury, the nonsuit or dismissal provided for in the last two sections shall be made before the cause is finally submitted to the Court and not afterwards."

In the Sansom case there had been a demurrer to evidence, and a motion to be permitted to take a nonsuit was made thereafter; and, under that state of facts, it was held that by virtue of these statutory provisions the motion to be permitted to take a nonsuit came too late, the Court saying: "Reading sections 4689 and 4690 together, it is perceived that by the retiring of the jury is meant the point of time when the case is submitted to them 'to consider of their verdict.' The reference is to the practice of the actual withdrawal of the jury from the box for the purpose indicated. Sometimes, however, after the argument is closed, and all instructions have been delivered to them, the jury are permitted to make up their verdict in the box without an actual retiring for the purpose. We are of opinion the Legislature intended that the right to take a nonsuit in a jury case should finally cease when the jury should properly begin 'to consider of their verdict,' under the law as above stated, whether there should be an actual withdrawal from the jury box or not.

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The substance of the matter is that there shall be no nonsuit allowed after a case has been fully submitted to the consideration of the jury. . . . But when there is a demurrer filed to the evidence the case is withdrawn from the jury, the Court gives them no instructions, and it is not in their power to render a verdict, the facts being fully ascertained by the joinder in demurrer. It is true the case, after having been so withdrawn, may be again submitted to them for the purpose of estimating damages, if the Judge overrules the demurrer; but until it is so committed to them again, it is as fully out of their control as if it had never passed thereunder. The Circuit Judge, on overruling the demurrer, may submit the case for the assessment of damages to the same jury or to a new jury, as he may deem best."

We do not question the soundness of this holding, but we are of opinion that the motion for the direction of a verdict does not, within and of itself, have the effect of withdrawing the case from the jury as does the demurrer to evidence. In the case of *Virginia-Tennessee Hardware Company v. Hodges*, decided by our Supreme Court at Knoxville at its September term, 1912, the opinion in which has not yet been officially reported, but which is found in 149 S. W., 1056 (see now 18 Cates, 370), it was held that even the making of motions for the direction of a verdict by both sides to a lawsuit does not take the case from the jury in Tennessee. And in the case of *King v. Cox*, decided at a later date, but also at the September-1912 term at Knoxville, our Supreme Court had occasion to specially and elaborately consider the differences between motions to direct verdicts and demurrers to evidence. The opinion in that case is found reported in 151 S. W., 59 (18 Cates, 553). In the course of the opinion in that case it was said by the present Chief

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Justice of our Supreme Court: "In the demurrer to the evidence the defendant sets out all the evidence admitted by the trial Judge in behalf of the plaintiff, and confesses its truth. This is clinched by the joinder of the plaintiff. It is absolutely binding on the demurring party, with all legal and reasonable inferences that may be deduced therefrom, and is equivalent to a special verdict. It withdraws the case from the jury, and submits to the Court the application of the law to the facts. . . . On a motion for peremptory instructions, no joinder is necessary. It may be made at the close of the plaintiff's evidence, or at the close of all the evidence. If the evidence is conflicting on material points, or if diverse inferences as to material matters can be drawn from evidence not conflicting, the case must go to the jury, and cannot be decided by the Court. The motion to instruct does not necessarily dispose of the whole case. . . . Likewise, if there be a question as to the credibility of witnesses, the case must go to the jury. While a party who files a demurrer to the evidence must sustain it at his peril, the penalty being a judgment against him if he fail, such is not the result on failure to sustain a motion for peremptory instructions. The effect simply is that the case goes to the jury for trial. The party who files a demurrer to the evidence says, in effect, by his written submission, that there is no doubt as to any of the facts, and purports to set them all out, and, if there is any apparent conflict in the evidence so set forth, this by the act itself of filing the demurrer submits the decision and determination of the question of fact to the Court, for the harmonizing of all the evidence in respect thereof; while one who files a motion to instruct, although he asserts the evidence is without conflict, yet he does so in the submission to the rule of law that if there be any conflict or any material or de-

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terminative question of evidence it is the duty of the Court to overrule such motion and submit the case to the jury. *When a demurrer to the evidence is filed, the case as already stated is absolutely at once withdrawn from the jury, on a joinder of the plaintiff, while on a motion to instruct the question is submitted to the Court whether the case shall be withdrawn.* The opinion of the Court is merely invoked as to whether it is a case proper for the jury, or one for the Court alone, and the motion includes in effect a request of the Court for appropriate action in the event of his decision one way or the other. *Under the former practice no verdict of the jury is necessary, proper or permissible; in the latter case, the jury must render a verdict, albeit under the direction of the Court."*

The italics in the foregoing quotations are our own, and it will be seen from the entire quotations, and especially from the portions italicized, that the making of a motion for the direction of a verdict does not have the effect of withdrawing the case from the jury; but, as said by our Supreme Court, it is a submission of the question as to whether the case will be withdrawn, or as differently expressed, whether the jury shall be required peremptorily to render a verdict under the directions of the Court in favor of the party making the motion. We think these differences between the effect of the demurrer to evidence and the motion to direct a verdict differentiate the case at bar from the Sansom case and become conclusive of the case at bar. The motion to direct a verdict, not having the effect of withdrawing the case from the jury, under the express terms of our statutes the application for nonsuit came in time, and the nonsuit was properly permitted.

It can be further said that it would have been anomalous and illogical to require the case argued to the jury if the motion to direct a verdict had already withdrawn it from

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the consideration of the jury. The very fact that it was still before the jury in the sense that it was proper to argue it to the jury, refutes the position that it was withdrawn from its consideration. So that both in logic and in law it is clear that the action of the trial Court was proper, and its judgment is affirmed, with costs.

B. H. SPRANKLE v. LULA MATHIS.

Writ of certiorari denied by the Supreme Court.

(*Knorville*. September Term, 1913.)

1. EVIDENCE, CIRCUMSTANTIAL. *Weight of.*

Circumstantial evidence may be sufficient to overcome the positive swearing of witnesses.

2. NEGLIGENCE AS REMOTE CAUSE. *When there is a new and intervening cause.*

An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted without a new and independent cause interrupting the natural sequence of events, is not actionable, as the intervening cause is the proximate cause and the negligence is the remote cause.

3. NEGLIGENCE AS THE PROXIMATE OR REMOTE CAUSE. *Test, not first when there are independent concurring causes.*

The test as to whether negligence is the proximate or remote cause of an injury, where there are other causes concurring, is: Was the injury the natural and probable consequence of the negligence, such as could have been reasonably anticipated to flow from it? If so it is the proximate cause, notwithstanding other concurring causes, if not the other concurring causes cannot make it the proximate cause. If, however, the concurring causes are themselves the result of the negligence,

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then it will be treated as the probable cause, though the negligence without the concurring causes would not have caused the injury.

4. TRANSCRIPT OF RECORD. *Paper merely copied into not part of.*

An affidavit merely copied into a record or transcript and not made part of it by bill of exceptions or otherwise, as exhibits, etc., is not a part of the record.

FROM KNOX COUNTY.

Appeal from the Circuit Court of Knox County. Von
A. HUFFAKER, Judge.

CHAS. S. SMITH and A. C. GRIMM for Plaintiff.

SHIELDS, CATES & MOUNTCASTLE for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the
Court.

MISS LULA MATHIS brought this suit in the Circuit Court of Knox County to recover damages for personal injuries received as the result of the falling of a cage of an elevator in the National Building in the city of Knoxville, in which she was a passenger. Verdict and judgment were obtained for \$1,250, and the motion of defendant below, B. H. Spankle, for a new trial having been overruled, he appealed to this Court, and has here made fifteen formal assignments of error. We will not take up all the assignments seriatim, as some of them but repeat the same question in different forms, while others are so related as that they can be considered together.

At the conclusion of the testimony offered on behalf of plaintiff below, and again at the conclusion of all the testi-

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mony, defendant below having offered testimony in his own behalf, motions were made to have the jury return a verdict in his favor. These motions were each time overruled, and the rulings of the Court thereon are assigned as errors.

Miss Mathis, plaintiff below, was in the employ of M. B. Arnstein & Co., and was in the habit of going to the second floor of the National Building, which is situated near the business house of M. B. Arnstein & Co., to eat her noon meal, or take a lunch, where meals were provided and served by what is known as the Girls' Friendly Society. On April 25, 1910, about the noon hour, or perhaps somewhat thereafter, Miss Mathis started to the second story of the National Building to take a lunch. She entered that building and passed through a door and into a hallway or vestibule to where an elevator entrance was provided, and, finding the door open and the elevator cage there ready to receive those desiring to enter, as she says, she stepped into the cage, when a Mr. Holden, who, as she thinks, had gone in advance of her into the hallway or vestibule, entered just behind her, and following him another man with two children entered. A colored boy was the regular operator of the elevator, but he was not present, and Mr. Holden, who occupied an office in the National Building, when these people had entered, proceeded to operate the elevator in a careful and the usual manner, as he and all the other witnesses testify, but when it had ascended to almost the point of landing on the second floor the cable broke or gave way and the cage fell. As a result Miss Mathis' right ankle was broken.

The regular operator of the elevator, according to his testimony, had shut down the elevator because "it felt like it was working out of order," and had written on the door in large letters the words, "Out of order," and closed

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the door to the extent of latching it, and gone out to get someone to fix it, and was gone about five minutes, during which time the accident occurred. At the time he left, according to his testimony, there was another colored boy present who had been operating the elevator some at times when the regular operator was not there, and especially at the noon hour when the regular operator would go to get his noon meal. This colored boy who operated the elevator at times for the regular operator, swears that he saw the regular operator write the words "out of order" on the door, and, to use his language, saw him "pull it shut." In answer to the question, "Did he leave it standing open one or two or three inches, or close it all the way"? he answers, "He just pulled it shut. I don't know whether he left it open any or not. I know he pulled it shut." And he repeatedly uses the vague expression that he does not know whether it was left entirely closed or whether it was shut. This helper says that when the regular operator left, "he left me standing there 'side of the building," clearly indicating, when his language is taken in connection in which it is used, as we think, that he was left there by the side of the building in the vestibule where the elevator was. To quote from his testimony, this witness, at one place, testifies with reference to the door as follows:

"Q. When you pushed the door to, would it latch, would the jar catch and latch the door?

"A. Sometimes it would latch.

"Q. Sometimes it would latch?

"A. Yes, sir; push it shut, it would latch.

"Q. If you pushed it to right, it would latch, would it?

"A. Yes, sir; push it to right, it would latch.

"Q. Do you know whether it latched on this occasion when Albert (the regular operator) shut the door?

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"A. No, sir; I don't know whether it latched then or not, because he told me he wasn't going to run it, and I just came out front.

"Q. Did he close the door all the way over?

"A. He pulled it shut; yes, sir.

"Q. Did he leave it standing open one or two or three inches, or close it shut all the way?

"A. He just pulled it shut. I don't know whether he left it open any or not. I know he pulled it shut."

Mr. Holden, who was operating the elevator at the time the cage fell, and who thinks Miss Mathis was in the elevator when he entered the vestibule and first observed her, though she thinks he was in the vestibule when she went in, says that when he went into the vestibule he started to go up a stairway leading from the hall or vestibule from which the elevator entered, and that when he went to step up on the first step of the stairway, he noticed Miss Mathis then in the elevator, and decided that he would run it up to take her to the second floor. He says he had previously been told by the regular operator how to run it, and that he had run it before, and gives these, together with his desire to accommodate Miss Mathis as his reasons for undertaking to operate the elevator on this occasion.

On the question of his and other tenants' before that time having operated the elevator he is asked and answers as follows:

"Q. Had you run the elevator before this day?

"A. Yes, sir.

"Q. Many times, or few times?

"A. Oh, a number of times.

"Q. Was it customary for the tenants of the building there to run the elevator when the boy was not there?

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"A. Well, I don't (know) as it could be said to be customary.

"Q. You, yourself, were in the habit of running it, were you not?

"A. Well, yes."

He, in other parts of his testimony, swears to substantially the same effect, in one place, in speaking of having seen others than the two boys already spoken of as the operators operate the elevator, going to the extent of giving the name of one other party who he had seen operate it, and with whom he says he had ridden when running it; and from these facts he says he "supposed that it was all right for anyone that wanted to to run it." He says he cannot say how many times he had ridden with this other man—a Mr. Smith—whom he says he had seen running the elevator and with whom he had ridden when he was operating it, and further says that he thinks this occurred in the absence of the regular elevator boy. Miss Mathis assumed, without knowledge to the contrary or anything to put her on notice, that Holden had a right to operate the elevator.

All of the testimony indicates that at the time Miss Mathis entered the elevator the door was pushed so far back into a slot into which it worked that the words, "out of order," which had been written on it could not be seen; and that the door was entirely open, or so nearly so that the little space that projected out of the slot was insignificant. Some of the testimony is to the effect that the door lacked perhaps three inches of being entirely back into the slot.

It is insisted on behalf of plaintiff in error that the regular operator having testified that he left the door entirely closed and latched, and no one having contradicted

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this, it is established as a fact in the case that he did close it, and that it follows that some unauthorized person raised the latch and opened the door, it appearing that it might have been raised by one from the outside by special effort. We are not able to assent to this proposition. The boy who had been assisting in the operation of the elevator shows that he had gone just out of the elevator and taken his seat on the outside of the building when the regular operator left, and he likewise shows that the accident occurred in about five minutes after he had gone. He further gives the names of the people who had entered the building during that time. These people all show that they did not open the door, but each and every one shows that it was open when he entered; and we think the fact that the door was found actually standing open just after the operator left, together with the testimony of the assistant operator who was present when it was closed, showing that he could not say it was closed by the operator when he left, are potent as evidence to contradict the regular operator when he says he left it entirely closed, and that from this evidence the jury was abundantly warranted in finding that he did not leave it closed. It cannot be questioned but that circumstances may contradict the positive swearing of witnesses, and we think it impossible to read the record in this case without coming to the conclusion that the circumstances, which are too voluminous to be detailed in this opinion, with great force contradict the evidence of the operator when he swears he left the door closed, and that the jury were more than supported when they refused to believe him on that matter.

Of course, if the operator went away and left the door open with the cage at that point ready to be entered, as we say the jury was justified in finding that he did do, and that, too, without anything visible to warn the public or

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those who might have occasion to enter, that the elevator was out of order, that was negligence with which the owner is chargeable. That the operator knew it was out of order is unquestioned, because he admits that he left for the very purpose of having it repaired or "fixed," as he expresses it.

It is next said that the act of Holden in going into the elevator and operating it without authority was an independent intervening cause or agency which became the proximate cause of the injury, and that for that reason the plaintiff in error cannot be held liable; and the case of *Cole v. German's Saving & Loan Society*, 59 C. C. A., 593, 124 Fed. Rep., 113, is strongly relied on in support of this proposition. We have read the opinion in that case with painstaking care, and while we find the facts of that case and the facts of the case at bar strikingly parallel, we find differences which, even according to the holding of that case, make plaintiff in error liable in the case at bar. The facts of that case, in so far as it is necessary to set them out for the present purpose, as they are stated in the opinion of the Court, are as follows:

"The plaintiff, Viola Cole, sued the German Savings & Loan Society for damages which she alleged were the result of its negligence in the care and operation of its elevator, and at the close of the trial these facts were established: About 4 o'clock in the afternoon of a bright, sunshiny day in May, the plaintiff, a lady 32 years of age, entered the hall of a building of the German Savings & Loan Society for the purpose of riding on an elevator to an upper story. The well of this elevator was about forty feet distant from the entrance to the hall, into which it opened. It was separated from the hall by a door, which at the time was standing open not more than ten inches. As the plaintiff passed through this hall, a boy who was

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a stranger to her, and who was not employed by or authorized to act for the defendant, but who had been seen by one of the witnesses prior to that time endeavoring to operate the elevator once, and riding upon it and visiting the boy in charge of it a dozen times, hurriedly passed the plaintiff, seized the sliding door to the elevator shaft, pushed it back as far as it would go, and stepped back. The elevator was at the upper story in charge of its regular operator. The plaintiff supposed that the strange boy was the operator of the elevator, stepped into the shaft, and fell ten and one-half feet to its bottom, and was seriously injured."

The trial Court, under this state of facts, directed a verdict for defendant, and that action was held proper by the Circuit Court of Appeals. In the course of the opinion by Sanburn, Judge, speaking for the last named Court, it is said that the crucial question there was, "whether or not the negligence of the defendant was the proximate cause of the injury of the plaintiff." And in distinguishing between proximate and independent intervening remote causes the following language is used:

"An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. . . . The independent intervening cause that will prevent a recovery on account of the act of omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act

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or omission, and produces a different result, that could not have been reasonably anticipated. . . . The test of the liability, therefore, in case of concurring negligence is the same that it is in all other actions for negligence. It is the true answer to the questions: Was the injury the natural and probable consequence of the act on which the action is based? Was it reasonably to be anticipated from that act? If it was, the action may be maintained, although the negligence of another concurred to produce the ontoward result. If it was not, the act of negligence will not sustain an action, whether the act of another concurred or failed to concur to produce it. A negligent act from which an injury could not have been foreseen or reasonably anticipated is too remote in the line of causation to sustain an action for an injury in every case, and the concurring negligence of another cannot make it less remote, nor charge him who committed it with responsibility for it to which he would not have been liable to answer in the absence of the negligence of the third party.

"It is not here asserted that there may not be many cases in which one who has committed a negligent act may be liable for an injury which is the result of his wrongful act and of the concurring negligence of another, but which would not have followed in the absence of the recklessness of the third party. The succeeding or concurring negligence of another and its evil consequences may be the natural and probable result of a defendant's act of negligence, so that the latter may be actionable. . . . The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? *Railway Co. v. Kellog*, 94 U. S., 469, 475; 24 L. Ed., 256."

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We might here add that these distinctions between proximate and intervening remote causes are recognized by all the authorities. See 1 Thompson on Negligence, sections 49 and 50, where many cases in point are referred to. In section 49, quoting from *Lane v. Atlantic Works*, 111 Mass., 136, it is said: "The act of a third person, intervening and contributing to a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable, direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise."

Applying these principles it is further said in the case of *Cole v. German Savings & Loan Society*, "The burden of proof was upon the plaintiff to establish a state of facts which would naturally lead to the conclusion that her entrance and fall in the well were the natural and probable consequences of these acts of negligence committed by the defendant." And it was held that the proximate cause of the injury in that case was the "act of the trespasser who opened the door and extended to the plaintiff the invitation to step into the darkness and fall."

After thus announcing the legal principles and analyzing the facts of that case, the Court uses the following very significant language with reference to the efforts of counsel to escape the conclusion that the act of the trespasser was the proximate cause of the injury: "But counsel seek to escape from the natural effect of this evidence by the contention that the voluntary act of the strange boy in opening the door of the well when the elevator was at an upper floor could and should have been foreseen and anticipated as the probable result of the un-

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locked door, of the visits of the boy upon the elevator, and of his previous attempt to operate it. The argument loses sight of the fact that the wrongful act of this trespasser was not committed in operating, or in attempting to operate, the elevator, in riding or visiting upon it, or in the doing of any act which he had ever done before"; thus in effect conceding that if the trespasser had ever done that act before there might be liability. Now, with that concession, what can be said where there is positive evidence that Holden in the instant case had not only operated the elevator before, but was actually in the habit of doing so?

But it is said that plaintiff in error did not know of this habit; the reply to which is that in the exercise of reasonable diligence he should have known of it, or at least the question of his knowledge or being chargeable therewith was a question for the jury. It is also said that Miss Mathis did not know of the habit of Holden to operate the elevator, and such is the fact, but how can this be material? The fact that she did not know of one of the controlling causes of negligence with which the owner is chargeable certainly does not relieve the owner from liability.

But aside from and independent of the Cole case, under the holding of our Supreme Court in the case of *Building & Loan Association v. Lawson*, 13 Pickle, 367, there was liability on the part of the owner where one not the operator of an elevator but meaning only to become a passenger therein, on merely seeing the door open, entered for the purpose of becoming such passenger and herself began operating it in the absence of any operator and was injured by so doing. Under the doctrine of that case it would appear that the instant case should have gone to the jury even if Holden had never operated the elevator in the National Building before. We are at a loss to see

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how one could recover who, under such circumstances operated an elevator herself, but could not recover if, under the same circumstances, another unauthorized person attempted to operate it. In truth, the facts of the instant case are more favorable to a recovery than were the facts of the Lawson case, even if Holden had never before operated the elevator, for in the Lawson case the injured plaintiff attempted to operate when she of necessity knew she did not possess the requisite skill, while in the instant case Miss Mathis had no actual knowledge of Holden's skill or lack of skill.

We think it clear that there was no error in the trial Court's submitting the case to the jury.

There is another assignment, based on an alleged improper argument of counsel for plaintiff below. The only matter found in the record to support any such assignment is an affidavit made by counsel for plaintiff in error setting out what it is said was argued to the jury. This affidavit, however, is not made a part of the record by the bill of exceptions or otherwise, but is simply copied into the record. Under this state of facts it is only necessary to say that the affidavit is not properly a part of the record. *Stewart v. State*, 7 Cold., 338; *State v. Hawkins*, 7 Pickle, 140.

Other assignments of error are disposed of in an opinion filed with the record, but the questions involved are not of sufficient interest to require publication.

The judgment of the lower Court is affirmed, with costs.

Oliver v. Greenwood.

THE OLIVER CO. v. A. GREENWOOD & CO., ET AL.

Writ of certiorari denied by the Supreme Court.

(Knoxville. September Term, 1913.)

1. ACTIONS, EX CONTRACTU OR EX DELICTO. *When an action is one in tort or one on a contract.*

Where an action may be brought in *assumpsit* for breach of a contract, or for a tortious violation of duty growing out of the contract, at the option of the aggrieved party, and the same facts have to be averred substantially in either case, if the contract stipulations are set out and its breach averred and the action is based thereon it is one on the contract; but, if the contract obligations are set out as mere inducement and the action is based on a breach of duty growing out of the contract but imposed by law, viz: a violation and disregard of duties which the law implies from the contractual relations of the parties, it is an action for the tort.

2. SAME. *Case in judgment.*

O., a general contractor engaged in erecting a building, alleged in his declaration that G., a subcontractor, had a contract for doing the glazing and painting, under which it was G.'s duty to set certain plate glass, but that, instead of setting same in a good workmanlike manner, as in duty bound under the contract, he handled it so carelessly and negligently that one of the large pieces was broken and destroyed, and that the carelessness and negligence of G. was the cause of the breaking, and that because of the negligence and carelessness, wrongs and defaults of G., O. was damaged in the sum of five hundred dollars; for the recovery of which suit was brought. *Held*, That the action is one to recover damages for the tort, and not to recover for a breach of the contract.

3. PLEADINGS. *When action is trespass on the case.*

The declaration making the case stated in the last preceding division of the syllabus is one which at common law would have been trespass on the case, rather than one of simple trespass.

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4. SAME. *Right to plead as at common law, and incidents.*

Under the provisions of Shannon's Code, section 4338, parties litigant in Tennessee have the right to plead as at common law, and when so pleading their rights under the issues made up are preserved as at common law.

5. SAME. *What evidence admissible under general issue in trespass on the case.*

In an action of trespass on the case, as distinguished from one of simple trespass (the one mentioned in the second division of this syllabus), under the general issue evidence in explanation of a contract alleged to have been tortiously breached, and of a custom among glass cutters as to who assumes the risk of cutting large pieces of plate glass, and of statements of plaintiff's agent as to who would assume the risk, is admissible on behalf of defendant, as, in such situation, whatever would, in equity and good conscience, prevent the plaintiff from recovering may be given in evidence, except alone the statute of limitations.

FROM KNOX COUNTY.

Appeal from the Circuit Court of Knox County. VON
A. HUFFAKER, Judge.

HORACE VANDEVENTER and LINDSAY, YOUNG & DON-
ALDSON for Plaintiff in Error.

A. Y. BURROWS for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the
Court.

THIS suit was brought in the Circuit Court of Knox
County in 1907, and in 1909 it was before this Court
on appeal from the action of the trial Court in directing
a verdict in favor of defendant. The chief question at

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issue, then, was the sufficiency of the declaration to render admissible certain evidence. This Court held the declaration sufficient, reversed the judgment of the trial Court, and remanded the case for further proceedings, and on petition for certiorari the action of this Court was affirmed by the Supreme Court. The case is now before this Court for the second time, and again the contentions of the parties center around the pleadings. Plaintiff in error, a corporation, which was plaintiff in the Court below, contends that the action is one *ex contractu*, while defendant contends that it is one *ex delicto*; and the assignments of error are all based on, and the contentions in the case all grow out of, the conceptions of the parties as to the character and sufficiency of the pleadings. In this situation it becomes necessary to determine first just what the case made by the declaration is, whether an action *ex contractu* or one *ex delicto*; and, second, just what issues are made by the pleadings filed subsequent to the declaration, when considered in connection with the declaration.

The declaration avers that The Oliver Company was the general contractor for the construction and erection of a building in Knoxville known as the VanDeventer Building, and was, in January, 1906, engaged in the construction thereof; that Albert Greenwood and Charles Greenwood, both of whom are made defendants, operating under the firm name of A. Greenwood & Co., were subcontractors for the painting and glazing to be done in the building, and that as such subcontractors it became and was their duty to set and fix in place certain plate glass which plaintiff furnished and provided on the site of the building; and it then proceeds as follows:

"Plaintiff avers that defendant, after accepting said glass in said good order and condition, and unbroken and after taking charge of the same, instead of taking care of

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same, and handling same and setting same in place, in like good order and condition, and in a good workmanlike manner, as they were in duty bound to do under their contract with plaintiff, handled same so carelessly and negligently that one of the large pieces of plate glass intended to be used for said front or show windows of the store as aforesaid, was and became broken, destroyed and rendered wholly unavailable for use anywhere in said building, and this without any neglect or default on the part of plaintiff.

"Plaintiff avers that defendant's carelessness and negligence was the prime, proximate and efficient cause of the breaking, destruction and loss of said piece of plate glass.

"Plaintiff further avers that owing to, and because of defendant's said negligence in breaking and destroying said piece of plate glass as aforesaid, that it was compelled to purchase and furnish another large piece of plate glass to replace the one so broken and destroyed by defendants as aforesaid, for which it had to pay a large sum of money, that plaintiff had also to pay other large sums of money as freight charges on said piece of plate glass purchased and furnished by it to replace the piece destroyed as above alleged, and further and additional sums of money for drayage on same from the railroad depot to the site of said building.

"From all of which negligence, carelessness and wrongs and defaults, of defendants, plaintiff was damaged in the sum of five hundred dollars, for which it sues defendants."

There is no averment in this declaration of any promise by defendants to pay any amount because of the breaking of the glass.

Treating this case as one which might have been brought for breach of the contract, or for the tort, at the option of the party suing, the following are apposite:

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In 4 Standard Encyc. of Procedure, page 651, is found this:

"In cases where the plaintiff has an election to sue in assumpsit for a breach of contract, or to bring an action on the case, for a violation of duty growing out of the contract, it is often difficult to determine whether a count is in form *ex contractu* or *ex delicto*. The same facts have to be averred substantially in both instances, the difference being, that in one the complaint declares on the contract, and assigns breaches of the contractual stipulations; and in the other, the contract is stated as mere inducement, and the cause of action is founded on a breach of duty growing out of the contract and imposed by law. Though the transaction may have had its origin in a contract, if the facts stated show that the cause of action is a violation or disregard of duties which the law implies from the contractual relations and conditions of the parties, the count will be regarded as in case. The test of certain and easy application is, the measure of recovery to which the count is adapted."

See also 1 Chitty on Pleadings, star page 152, where it is said that in the English case of *Mast v. Goodson*, 3 Wils., 348, "it was held that a count in case, setting out an agreement by which the plaintiff was to build a yard in defendant's close, and lay out not less than 20 l, and was to enjoy it for life, and averring that plaintiff built the yard and enjoyed it for some years as an easement, but defendant afterwards wrongfully obstructed him in the enjoyment of it, was good. In that case the action was founded on a contract; but the obstruction to the plaintiff's right for which the action was brought was *ex delicto*, although the right also arose out of the contract."

Other authorities might be cited and quoted from, but they are all to the same effect, and it is therefore not

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deemed necessary. Applying the principles announced in the two just quoted from, we think it clear beyond controversy that the action in this case is for the tort rather than for breach of contract; the charge being that instead of handling the glass as defendant was in duty bound to do under the contract, it was "*so carelessly and negligently handled*" that one of the large pieces or plates was broken; and again that defendant's "*carelessness and negligence* was the prime, proximate and efficient cause of the breaking;" and, further, that because of that breaking plaintiff was compelled to furnish other pieces of glass to replace the one broken and to pay other large sums of money as freight charges and drayage; and the declaration then concluding with the statement that, "For all of which negligence, carelessness and wrongs and defaults of defendants, plaintiff was damaged in the sum of five hundred dollars, for which it sues defendants." So that here is an express claim put forward for \$500 because of the negligence, defaults and wrongs of defendants, and not only that, but an effort to recover for all the incidents *of the wrongs* rather than for breach of the contract. Clearly the setting out of the contract is an allegation by way of inducement.

Having reached the conclusion that this is an action *ex delicto*, we will consider the issue tendered by the declaration and made by pleadings filed subsequent thereto; and in this connection it is proper to refer to the questions made by the assignments of error.

Defendant filed two pleas, one of not guilty, and another of accord and satisfaction, and issue was duly taken on the plea of accord and satisfaction, but there is no serious contention that the proof sustained that plea, so it is not necessary to further notice it. The effect of the plea of not guilty—what issues are made by it—is the question presented.

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In the progress of the trial it was developed without question or controversy that the obligation assumed by defendant as to the putting in of the glass arose in this way: Defendant wrote plaintiff a letter submitting a proposition, which letter is in the following terms:

"KNOXVILLE, TENN., Jan. 6, 1906.

"THE OLIVER CO.

"GENTLEMEN—We will paint, varnish the VanDeventer Building on Wall street, per revised plans and specifications, set all plate glass in lower front, and sheet glass in upper front, also all glass in interior for the sum of \$1,000.

Yours truly,

"A. GREENWOOD & Co."

This proposition was accepted by plaintiff without qualification or modification.

It was shown on the trial of the case below, and not disputed, that plaintiff, The Oliver Company, delivered certain plate glass on the ground at the building which was being erected, and that defendant, when it came to put the glass in, found a large piece of it too large for the opening into which it was to be placed. It thereupon called the attention of one Smith, who was on the ground as superintendent of construction for plaintiff, to the fact that the glass was too large, and was directed by Smith to cut the glass down to the proper size. In connection with this direction a Mr. Arnott, in charge of putting the glass in on behalf of defendant, called attention to the fact that the matter of cutting large plate glass with the means at hand was very risky, that the glass was liable to break, and that A. Greenwood & Co. would not assume the risk of its being broken in the cutting. Smith thereupon stated that plaintiff would assume the responsibility for the cutting, but not for the handling. Defendant, through its

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man Arnott, then proceeded to cut the glass, when, as a result of the effort to cut it, it broke.

During the progress of the trial, defendant offered testimony tending to show that the obligation to *set* the glass did not include the matter of cutting it, and that where one had contracted to *set* glass only, rather than to furnish it and set it, the risk of cutting it was on the party furnishing it in the absence of a contract to the contrary, various witnesses testifying that such was the rule or custom prevailing as to the setting of large glass. In fact, no one testified to the contrary. Evidence was also introduced for the purpose of showing that the obligation to *set* did not include the duty of furnishing, but this was admitted, so that there was no controversy on this question.

Exceptions were made by plaintiff to that evidence offered by defendant tending to show that the duty of setting glass did not include the duty of cutting it, and also to that evidence tending to show that in the absence of a contract to the contrary such large plates of glass as that involved were cut at the owner's risk rather than the risk of the cutter; and exceptions were offered to the evidence of Smith's statement or direction to cut the glass at the risk of plaintiffs.

The contention in support of these exceptions, made both in the trial Court and in this Court, is that under the plea of the general issue it was not proper practice for defendant to introduce evidence of these matters in defense, and that it was error to permit evidence thereof.

Whether or not the matters of defense relied on and sought to be established by the evidence excepted to can be made under the plea of not guilty, depends on whether the action is one which would, under the common law classification of pleadings, have been an action of trespass or one of trespass on the case. The reason for this state-

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ment is that at common law the plea of not guilty had a much more limited scope in actions of trespass than in actions of trespass on the case. This is settled by all the authorities on common law pleadings, and attention is called to it in our own case of *Plowman v. Foster*, 6 Cold., 52. In that case it is said:

“There is an essential difference between actions of trespass and trespass on the case. The first is *stricti juris*, and matters in excuse or justification, must be pleaded especially. The other is founded in the justice and equity of the case; for, whatever would, in equity and conscience, according to existing circumstances, preclude the plaintiff from recovering, might, in an action on the case, be given in excuse, by the defendant, under the general issue; because the plaintiff must recover upon the justice and conscience of his case, and on that only. 1 Chitty’s Pleadings, 491.”

And, speaking further with reference to the plea of the general issue in that case, which was an action of trespass on the case, it was said:

“The general issue pleaded to this declaration, is a denial of the whole cause of action, and puts in issue every essential fact stated in the declaration, and the plaintiff is bound to prove his case. In this form of action, under the general issue, the defendant may give in evidence any matter which operates in discharge of the cause of action, and he is not bound to plead his defense specially.”

The difference between what is put in issue in a plea of not guilty, or of the general issue as it is more often styled, in an action of trespass, and what is put in issue by the same plea in an action of trespass on the case, is clearly pointed out in Caruther’s History of a Lawsuit (4th Ed.), on pages 188 and 192. At page 188 it is said:

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"In an action of trespass affecting property, real or personal, the plea of not guilty puts in issue two facts, the alleged wrongful act, and the title of the plaintiff, and under it the defendant may show in the evidence, that he did not commit the act complained of, or, if he did, that the plaintiff has no title or interest in the property upon which to found his action for the injury. The *lawful possession* of the property by the plaintiff is usually all the interest required to support the action. The defendant may, under the general issue, show title or right to possession in himself or in another under whom he claims, for that would disprove property or right to the possession in the plaintiff. If the defense is to be rested upon any other than the two facts above stated—that is, the denial of the act, and of the plaintiff's title or interest in the property, the general issue will not apply, but the defendant must resort to a special plea."

On page 192 this language is found:

"If the wrong complained of is such that at the common law the form of action must have been trespass on the case, then libel and slander being excepted, the general issue, not guilty, not only denies the wrongful acts complained of, but admits evidence of justification or excuse, and also any matter of discharge, such as arbitrament, compromise, former adjudication, accord and satisfaction, release, and, indeed, anything that will defeat the action, *except the statute of limitations*. It is said in these actions the plaintiff must proceed on the justice and conscience of his case, and, therefore, whatever would in equity and good conscience preclude the plaintiff from recovering, may be given in evidence by the defendant under the general issue, the statute of limitations, which must be specially pleaded, constituting the only exception."

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So it is seen the real inquiry in the instant case, viz.: What matters can be offered in defense under the general issue, depends on whether or not the action is one which at common law would have been simple trespass, or whether it would have been one of trespass on the case; and, of course, this question of what the action would have been at common law must be determined by the technical rules of common law pleading.

In 1 Chitty on Pleadings, star page 151, is found the following:

“And though we have seen that assumpsit is the usual remedy for neglect or breach of duty against bailees; as against carrier, wharfingers and others having the use or care of personal property, whose liability is founded on the common law as well as on the contract; yet it is clear that they are also liable in case for an injury resulting from their neglect or breach of duty in course of their employ. For any misfeasance by a party in a trade which he professes, the law gives an action upon the case to the party grieved against him; as if a smith in shoeing my horse prick him, and other like cases. And it seems that although there be an express contract, still if a *common law duty* result from the facts, the party may be sued in tort for any neglect or misfeasance in the execution of the contract. If the contract be laid as *inducement* only, it seems that case for an act, in its nature a tort or injury, afterwards committed in breach of the contract, may often be adopted.”

In 6 Cyc., at page 688, it is said: “For the breach of an ordinary contract which involves no element of tort, an action of assumpsit is the proper remedy, and an action on the case will not lie; but when a duty is imposed by the contract or grows out of it by legal implication, and injury results from the violation or disregard of that duty,

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an action on the case will lie, although assumpsit may also be maintained."

In a note on the same page it is said:

"Where property is lost while in the possession of a bailee thereof, through the latter's negligence, the owner may recover therefor either in an action of assumpsit or in case as he may elect. *Ferrier v. Wood*, 9 Ark., 85."

Without pursuing the authorities further—and they might be greatly multiplied—we think the declaration in the instant case makes out a state of facts which at common law would be an action on the case, and that the general issue made admissible evidence of the matters of custom and other matters offered in evidence of which complaint is now made; and it might here be said that this view of the case is not in conflict with the provisions of Shannon's Code, section 4634 to 4638, inclusive, because, as provided in section 4638, it is not necessary for the litigants to plead in accordance with the preceding sections, but they may plead as at common law; and, as pointed out in *Insurance Co. v. Thornton*, 13 Pickle, 1, this last section, 4638, preserves the rights of the parties as at common law regardless of the preceding sections. It is further evident that there was no effort to plead under the statute in this case.

It results, there being no error in the matters complained of, the judgment of the lower Court in favor of defendant, is affirmed, with costs.

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WOODEUFF HARDWARE COMPANY v. H. K. HAVERLY,
ET UX.

Affirmed by the Supreme Court.
(Knoxville. September Term, 1913.)

1. **MARRIED WOMEN.** *Separate estate. Liability for improvements. Charging.*

There is no such doctrine in this state as that the separate estate of a married woman can be charged by implication with her contracts, not even for materials and labor furnished to improve her separate property. In order to so charge the contract for improvements thereon must expressly charge the estate with its payment.

2. **SAME.** *Liability of the estate for improvements. Mechanic's and furnisher's lien.*

Our statutes provide the only means for securing or enforcing payment for materials furnished and labor used in improving the separate estate of a married woman in the absence of an express contract by her at the time that the amounts shall constitute a charge upon her separate estate.

3. **MARRIED WOMEN.** *Personal liability for contracts with reference to separate estate.*

No personal judgment against a married woman can be taken over her plea of coverture for materials furnished and labor expended for improvements upon her separate estate.

(Changed now by statute: Acts 1913.—Ed.)

FROM HAWKINS COUNTY.

Appealed from the Chancery Court of Hawkins County.
HUGH KYLE, Chancellor.

Hardware Co. v. Haverly.

A. T. BOWEN for Appellant.

J. O. PHILLIPS for Appellees.

MR. JUSTICE MOORE delivered the opinion of the Court.

THE defendant, Mrs. Haverly, is the owner of a separate estate in a large tract of land in Hawkins County. She inherited it from her father, but before her marriage to her co-defendant they had a marriage contract, which was made the 27th of April, 1902, and in this agreement it was stipulated that all her property she then owned, both real and personal, or that she might thereafter own, should be and remain her sole and separate property, free from the control and management of her husband and not subject to his debts then existing, or any thereafter incurred by him, and that she was to have full and absolute right and power to control, manage, sell, rent, lease or dispose of her said property as she may deem to her best interest. After this agreement was made they were married. In the early part of 1910, she decided to erect on her lands in Hawkins County a new dwelling house, or to rebuild the old one then on it, and, with that purpose in view, she procured an architect in the city of Knoxville to draw plans and specifications for the home she wanted to erect. This was done, and the complainants, who are dealers in hardware and building material, in the city of Knoxville, learned from the architect that she contemplated building the house on her lands, and sent their traveling salesman to see her at her home. He spent a day and a half or two days with her, trying to effect a sale of such material as complainants had in stock, that she needed in the building of her house. After spending this time with her, she and the salesman reached an agreement, by which complainant sold to her a large number

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of articles to be used in the construction of the house, a list of which accompanies the bill, as an exhibit thereto, amounting in value, according to complainant's contention, to \$1,290.00. Mrs. Haverly, however, insists that they agreed to furnish all these articles at the lump sum of \$975.00, and the only difference between them as to the contract is in this respect. The articles were furnished by complainant and, at the time the bill was filed, most of them had been used in the building. It is charged, however, that a great number of articles shown on exhibit to the bill, were still on hands when it was filed, and had never been used by attaching them to the building. The value of these articles not so used in the building is shown to be \$195.75, and consists in the main of hardware, listed on page 4 of the exhibit. The house was erected, but never completed, and most of the articles sold by complainant to her were used in its construction, and permanently attached to the building. The complainant, however, insists, in its bill, that articles to the value of \$195.75 had not been used in the building. This contract of sale to her for these articles was made 15th of March, 1910, and the bill filed 28th of April, 1911. The defendant, Mrs. Haverly, paid on this account, October 15, 1910, \$300.00, leaving a balance due, according to complainant's contention, of \$990.04, but according to Mrs. Haverly's insistence of \$675.00. This was all that she had paid at the time the bill was filed. It is charged in the bill the amount sued for is justly due and that she received the articles and has used most of them, with the exceptions stated, in the construction of her house, and that she ought to be compelled to pay for them. At the time this bill was filed, and, in fact, when this contract was made, complainants knew that the title to the land, on which the house was built, was in Mrs. Haverly, then and ever since a mar-

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ried woman, but they did not know when they sold these articles to her, nor when they filed the original bill, that she had, when the contract was made with her, a separate estate in this property. It is charged in the original bill that if she files a plea of coverture and denies her liability for the debt on that account, that title to all the property sold her to be used in the building, immediately reverts to it, under the law, and that it has the legal right to repossess it, or any part of it capable of repossession, without injury to the building or any of her other property," and it is then especially averred "that a Court of Equity will not permit her to retain the benefits from the same and at the same time refuse to pay for the property used in improving her separate estate, and seek to avoid payment solely and alone on the grounds of her coverture, but will compel her, either to pay for the property, or return it to complainants." It is further charged, that in case she refuses payment, because she was a married woman at the time she bought the property, "then complainants are entitled to a decree in this case, adjudging it to have title to and be the owner and entitled to the immediate possession of the two cultivators named, the columns, shingles, finishing hardware, sashes and each and every other article set out in this list which has not already gone into this house, or which, having been used, can be removed therefrom without injury thereto, and that it is entitled to a writ of possession of all said property, and to the aid of this Court in placing it in the full, complete and peaceable possession thereof." The prayer in the original bills is, "in case the defendant, Hattie H. Haverly, resist the payment of said account, on the ground that she was a married woman at the time of making thereof, then that Court decree that the title to all said property has reverted to complainant, and it is entitled

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to the possession thereof"; and it then prays for such orders and decrees as is proper to put it in possession of such property as has not been attached to the building, or that may then be removed from it without injury to it; and, in the closing paragraph of the prayer is the following: "In case she should dispose of any of said property, or undertake to convert the same in any way, by attaching it to the freehold, or otherwise, that she be held liable therefor as of a conversion thereof." We should have stated that two of the articles sold Mrs. Haverly and included in the account, as an exhibit to the bill, were two cultivators; but these were ordered by her husband and charged to her on her account, and used on her farm by her tenants. The marriage contract, heretofore mentioned, was not registered in the register's office until the 12th day of April, 1912, and it was a short time thereafter when complainant first learned of its existence, and thereupon it, through its attorneys, filed an amended and supplemental bill in this case, and this was done on the 10th day of May, 1912. In this supplemental bill, after setting out the charges in the original bill, it is then charged that the defendants made and entered into the marriage contract, mentioned, by and under which she was to have a separate estate in her lands, and that complainants did not know of the existence of the same until after it was registered in the register's office. It was then charged that with the exception of a few of the items set out in the account sued on and excepting also the two cultivators, every dollar of the account was for materials furnished the defendant, Mrs. Haverly, for the erection of the building on the tract of land, described, and was so sued and enhanced its value to the extent of the amount and value of the articles furnished her; and that the account and every cent thereof "represents a debt created

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by her for the direct and express benefit of her separate estate, and that it is liable therefor, regardless whether she is personally liable or not, under her plea of coverture. It is then charged that said debt becomes a charge on her separate estate without an express contract, either verbal or written, and that complainant has a right to proceed against her separate estate in a Court of Equity, and have said estate applied to the payment of its debt, under the Court's orders and decrees, whether the debt can be enforced against her personality or not. The amended and supplemental bill then prays, on the hearing of the cause, complainants have a decree declaring the account sued on and the cost of the cause a charge upon her separate estate and a lien thereon, from the date of the filing of such supplemental bill, and that so much of her said separate estate be sold as is necessary to satisfy the debt and the costs.

The cause was heard by Chancellor Kyle, on the 28th of March, 1913, and upon report of the Clerk and Master he decreed that the amount due complainant was \$782.38, for the articles furnished by it under the contract made 15th of March, 1910, thus sustaining her defense to the extent of \$184.00, for which amount a credit was allowed. The Chancellor further found that articles of the value of \$782.38 were furnished by complainant to Mrs. Haverly, were, by her, placed on her separate estate, in the erection of a house thereon, and to that extent benefited the same, and allowed complainant interest on this amount from the 28th of April, 1911, to the date of the decree. The Chancellor thereupon decreed that the total sum being \$871.00 and the cost of the cause were a lien upon her separate estate, and complainant had a right to have the same enforced by a decree of the Court. The Chancellor further decreed that the defendant, Mrs. Haverly, should be given thirty days from the date of the decree in which

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to pay the amount charged against her separate estate, and the cost of the cause, and failing to do so the Master was then directed to advertise and sell the tract of land, in which she had the separate estate, or a sufficient quantity thereof to satisfy the debt and costs. Mrs. Haverly excepted to this, prayed and obtained an appeal to this Court, and assigned as error the decree of the Chancellor in ordering her lands solds to pay this debt. The Chancellor did not give complainant a decree against Mrs. Haverly, but held at the time the debt was contracted she was a married woman, and, as she had pleaded her coverture, it was not entitled to a decree against her personally for that amount. The bill as originally filed was upon the theory that, if she plead her coverture the title to the property sold to her in March, 1910, which had not at the date of the filing of the bill been attached to and become a part of the house reverted to complainant, and that it was entitled to recover possession of such property. In addition to this prayer in the bill, it was sought to have certain property that was mentioned in the bill detached from the building and possession thereof delivered to the complainant, under sections 3533, 3534, 3535 of Shannon's Code. It was charged that the shingles and columns used in the building, and perhaps some other property that had been placed therein, could be removed from it without materially injuring or damaging the house. As regards this aspect of the bill, it is sufficient to say, we do not think complainant shows it has the right to the relief provided for under the Act of 1889, chapter 103, which was an amendment of the Act of 1881, chapter 67, and which Act, as amended, is carried into Shannon's Code, at the sections stated above. To be entitled to the benefit of the provisions of these sections, the materials must be furnished by complainant and placed in a married woman's

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house in ignorance of her right and title to it; that is to say, when the materials are furnished, the furnisher must not know then that they are to be placed on the lands, or in the building on the lands, the title to which is in a married woman. And in this case complainants readily admit, that when the contract was made with Mrs. Haverly, in March, 1910, they knew she was a married woman, and knew the title to the land, on which the building was to be erected, was in her, and for that reason they are not in a position to invoke the benefit of these Acts. Again, they were not in a position to have that benefit for the reason that the Act of 1889 provides that the furnisher must give to the married woman ten days notice of their intention to take and remove such property, or parts of it, as was sold by the furnisher and placed in the building; and there is no pretense in the record that complainants gave Mrs. Haverly this notice, in fact, the only knowledge she had of complainants' intention to invoke the benefit of the Act of 1889, was given to her in the bill filed against her. For these reasons complainant is not entitled to have a decree, or order, permitting it to remove from the building any of the articles sold by it to Mrs. Haverly, and used by her in the construction of the house in question. Whether it is entitled to have possession of such articles as have not been attached to the building restored to it by decree of this Court will be considered later on in this opinion.

Complainant's learned counsel places his right to relief in this Court almost entirely upon the ground that the articles sold this married woman by complainant were used by her on her separate estate, in the construction of a dwelling house thereon, and to the extent and value of the articles thus used enhanced the value of such separate estate; and to that extent benefited it and for that reason,

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in a Court of Equity, it has the right to have its debt remaining unpaid made a charge upon such separate estate, or declared to be a charge upon such separate estate, and a sufficiency thereof sold to pay the balance due complainant, and the cost of the cause. It is conceded by learned counsel that this is a question of first impression in this State, and that there is no direct adjudication of the Supreme Court sustaining this contention. It is also frankly admitted, there was no agreement between Mrs. Haverly and the complainant, at the time these articles were sold her, that the debt created for them was to be a charge upon her separate estate. It is admitted that complainant had neither parol nor written agreement with her to the effect that the debt thus created was to be a charge upon the separate estate she then owned. But it is earnestly, persistently and ably argued, that inasmuch as she had no other property at the time out of which and with which to pay the debt she was creating, and, further, inasmuch as the property she bought was used by her to enhance the value of her separate estate and benefited it to the extent of the value of the property furnished her, the law creates an implied agreement on her part to charge her separate estate with the payment of the debt made for its benefit. Her learned counsel, however, with equally as much force and ability, insists that there is no law in Tennessee that can make any debt created by a married woman a charge upon her separate estate, unless she has expressly agreed, either in writing or parol, to make that particular debt a charge upon it, and a long line of cases is cited in Tennessee in support of this contention of her learned counsel. The Chancellor correctly held that complainant was not entitled to any personal judgment against Mrs. Haverly, because, under the common law a married woman is not liable for her contracts

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of any sort or character. Her whole being and existence under the common law is merged into her husband, and she is utterly incapable of making herself liable upon any contract, whether in writing or parol. Courts of Equity, however, having first created what is termed her equitable separate estate have modified the rigors of the common law to the extent of holding, that in equity she may charge her separate estate with the payment of her contracts, provided that is done by an express written, or parol, agreement to that effect. And it has been repeatedly held in this State that separate estates can in no other way be charged with the payment of her contracts and that the only way she can charge her separate estate with such payment is by an express agreement, either in parol or in writing, to make such debt, or obligation, a charge upon such estate. Repeated efforts have been made in this State to make her separate estate liable for improvements made on it by her husband, under a contract with him, and, although it appearing she knew of such improvements, stood by and saw them being made, yet, inasmuch as she had made no contract to have them made and had not expressly charged her estate, either in parol or in writing, with the payment of such improvements, the Courts have in all cases held that her separate estate was not liable therefor. The English rule, which is sustained by abundant authority in the Courts of that country, is that where a married woman owns a separate estate and makes a contract with another, she is presumed to have charged it with the payment of her obligations entered into with the other party. In other words, the English Courts proceed upon the principle, that as she owns a separate estate and has no other property with which to pay her contracts, that when she enters into them she is presumed to have done so with reference to such separate estate and with

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the intention of charging it with the payment of such contract or obligation.

It is stated in Professor Pomeroy's Equity Jurisprudence, that the English rule has been adopted by the Courts of some of the American States, and it is likewise so stated in 21 Vol. of Cyc., and decisions from a number of States are cited in support of the text. We have, however, had occasion to examine a number of cases from other States, cited in Cyc. and by Professor Pomeroy, and in every instance we have found the rule is based upon a statute of the particular State, making the wife's separate estate liable for her debts created for its benefit. No such rule, however, obtains in Tennessee. On the contrary, it is stated in every decision by the Supreme Court of this State, bearing upon the question, that in order to render the contract of a married woman valid and a charge upon her separate estate, it must appear, first, that she is the owner of such separate estate; second, that she has the power to contract with reference to the same, and to charge it with the payment of her debts and contracts; third, that such debt, or contract, must be made with reference to such separate estate and made a charge for the payment of her debts and contracts, and her intention to do so must be clearly manifested by express words, and not left to inference or implication. This, we think, to be the substance and effect of all of the decisions in Tennessee bearing upon this question. She may charge her separate estate with the payment of the debt, for which she is only security thereon, or endorser, for another, but her intention to do so must clearly appear from express words, and not by implication or inference. The decisions of this State have gone to the length, and as we think justly so, of holding a married woman, owning a separate estate, may either in writing or parol, charge it with the pay-

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ment of her contracts, but to do so her contract must expressly charge her separate estate with the payment of the same.

Beginning with the case of *Morgan v. Elam*, 2 Yer., 375, and down to the latest expression of the Supreme Court, it has been, in an unbroken line of decisions, held that the only way a married woman may charge her separate estate with the payment of her debts is by her express agreement, either in parol or in writing to that effect, and that there is no other way by which it may be done. 7 Hump., 177; 8 Hump., 213; 10 Hump., 552; 4 Cold., 4; 4 Heisk., 115; 2 Tenn. Chanc., 771; 3 Head., 542; 1 Tenn. Chanc., 397; 2 Lea, 736.

It was stated by Mr. Justice Cooper, in *Ragsdale & Mabry v. Gossett*, "Our authorities are uniform, that in order to charge the estate of a married woman with her contracts there must be an express agreement to create a charge within the power conferred by the settlement upon her," citing 10 Hump., 552; 8 Hump., 209; 4 Cold., 5; 4 Heisk., 115; 2 Tenn. Chanc., 771. This rule was followed in 1 Pick., 412; 3 Lea, 461; 16 Pick., 482; 85 Tenn., 513-661; 93 Tenn., 222-390.

In 16 Pick., *supra*, it was held that, "it is well settled that a married woman, owning a separate estate with unlimited power of disposition, may charge it in equity with her debts and liabilities by an express stipulation in parol, or in writing, made for that purpose. In 1 Pick., 513, the Court held that a married woman could charge her separate estate for the payment of necessities furnished her by a note given for them, in which she expressly bound such estate as a charge upon, or against it, but it was held correctly, as we think, that such charge was not a lien on the estate. In 1 Pick., 161, the Supreme Court decided that she might, by parol contract, charge her separate

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estate with the payment of the debt that was created for its benefit, or enhancement in value. In 9 Pick., 322, the Court holds that she may expressly charge her separate estate for the payment of a debt on which she is only security, although her separate estate consists of a life estate. In 12 Lea, 561, it appeared that a married woman, in writing, expressly charged her separate estate with the payment of a debt she owed, and directed that it be paid out of her estate after her death, and it was held by the Supreme Court that she could do this, and that her estate was bound to pay the debt after her death. And it thus appears that the only way indicated or suggested by the Supreme Court, by which she can create a charge upon her separate estate, is by her contract, either in writing or in parol, expressly charging her estate with its payment.

In *Jackson v. Rutledge*, 3 Lea, 29, Mr. Justice Cooper says, in speaking to this question: "She can only bind her separate estate within the power conferred, by an express agreement and in the contract, if it is in writing. In 2 Chancery, the same learned Judge held, while Chancellor, that benefit alone to the separate estate is clearly not sufficient, citing 1 Tenn. Chanc., 397, and 13 Lea, 488, together with 3 Head, 542, as sustaining this proposition.

In *Ferdilicht v. Glass and wife*, 13 Lea, 488, Mr. Justice Cooper says: "Benefit alone to the estate, all our authorities agree, is not sufficient to charge it," but learned counsel for appellants insist and argues with much force and plausibility that benefit alone is sufficient, without any express agreement, either in parol or in writing, to charge the debt of the wife upon her separate estate, where it is created for its benefit. None of our adjudicated cases, however, where the question was raised and decided, sustain this contention. Learned counsel insists that all these cases that have been decided in Tennessee have ref-

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erence alone to the general debts of a married woman, and insist that the decisions only go to the extent of holding that to make the general debts of a married woman binding upon and a charge against her separate estate, there must be an express agreement to that effect, but he argues that this is not a general debt, but a particular and special debt, created for a particular and special purpose; that is, to enhance the value and benefit her separate estate. We have not yet found in any of the books, and certainly not in the decisions in this State, any such classification of a married woman's debts. In a sense, they are all general, and in a sense they are all special. A debt created by her in the purchase of a horse, for her use and benefit, is special and also general, and so it may be said of any other debt created by a married woman. There does not appear to be any such classification in the books, so far as our researches have gone, or the industry of the attorneys have brought to our attention. He insists, however, that this question has been decided by the Supreme Court of this State, in an opinion delivered by Mr. Justice Sneed, in 4 Heisk., 104. The bill was filed in that case by the complainant to make a note given by Mrs. Polk, a married woman, to complainant, for \$10,000, a charge upon her estate in certain lands in Maury County, in which she had a life estate. It appears that she also had a separate estate in Tunica County, Mississippi, and was managing both of them as a *feme sole*, and enjoying the income and profits therefrom. In the bill, it was charged that the money loaned by complainant to her was used by her on these two plantations, for their benefit, and for that reason the one in Tennessee should be charged with the payment of the note. The Supreme Court found, as a fact, that there was no agreement in writing, or otherwise, by her to charge her Tennessee separate estate with

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the payment of this debt, and it further found as a fact, that no part of the money borrowed by her from complainants was used for the benefit of or the enhancement of her separate estate in Tennessee; and there being no agreement, either in parol or in writing, by her that the money borrowed should be a charge on her separate estate, the Supreme Court denied complainant the relief sought in his bill. In the course of the opinion, delivered by Mr. Justice Sneed, he said, after speaking of the common law rule, that a married woman is not liable for her contracts, "but it is equally well established that in the view of a Court of Equity, a wife having a separate estate, which under the deed, will, or settlement by which she holds, she controls and manages as a *feme sole*, enjoying the profits and incomes, may charge the same for her debts by any unequivocal act or engagement clearly indicating her purpose so to do, to the extent of the power under the instrument under which she claims." And this is but a restatement of the rule, as declared by the Supreme Court in all of its decisions where this question was before them. After making the foregoing statement, and holding that the complainant in that case was entitled to no relief, upon the grounds on which his prayer was based, Mr. Justice Sneed then says: "It has been held in other States that without regard to any appointment, or undertaking on her part that the separate estate should be bound, when the demand is based upon money expended, or beneficial service rendered toward its preservation, a Court of equity will entertain a proceeding directly against the estate itself, for the satisfaction of the demand. And in this respect it makes no difference whether she is controlling the same as *feme sole*, or a trustee controls it for her use and enjoyment." For this proposition Mr. Justice Sneed cites some authorities from New York and one from South

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Carolina, and says: "In one of the cases cited, the Court said that "the plaintiffs, to sustain this suit, must show that the debt was contracted either for the benefit of the separate estate of the wife, or for her own benefit upon the credit of the separate estate." Taking this last quotation, as given by Mr. Justice Sneed, there does not appear to be any difference in the rule there stated than as announced by our own Supreme Court, for it appears that the debt created for the benefit of the estate, or for the wife's own benefit, must be upon the credit of the separate estate; or, in other words, as we understand the language, such debts must be made a charge by the wife on her separate estate and credit extended her for that reason.

In the case before us for our determination, the money sought to be fixed as a charge upon Mrs. Haverly's separate estate was not expended for the preservation, but for its improvement, and the case cited of *Martha Grimes v. Weems*, MS. opinion, at Nashville, 1870, where the Supreme Court of this State held, that a debt created by a married woman for the preservation of her separate estate was a charge upon it, and that such estate was bound for the services rendered by solicitors in its protection and preservation. That is not the case we have before us. We apprehend that where lawyers expended their services in the protection and preservation for the married woman, of her separate estate, they would have a lien on it for the payment of their reasonable fees for such services; or, in other words, such estate might be charged with the payment of fees to lawyers for such services. We are unable to see anything in the opinion of Mr. Justice Sneed that sustains the contention of complainant's learned counsel, and while he undertakes to state what the law of New York and as decided in one case in South Carolina, is, he does not say that the doctrine of these cases are ap-

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proved by him, and we do not find anything in this opinion that sustains the decree of the Chancellor in the respect we have mentioned.

Our statutes provide a way by which the separate estate of married women may be made liable for the payment of debts created for its improvement. The Act of 1881, chapter 67, section 1, as digested in Shannon's Code, section 3532, provides a way by which this complainant could have secured a charge against this married woman's separate estate, for the payment of her debt, contracted for the material furnished her, and in this Act of the Legislature it is provided "the lien given by the last section shall apply to, and embraces within its provisions, the lands, both separate and general estate, of *feme* coverts, when the contract is made with the wife and the land is sought to be charged with the lien evidence by a writing signed by her, and the legislature, having provided a way by which a married woman may charge her separate estate with the payment of debts created for its improvement, can it be done in any other way; and especially can it be done when she has made no contract whatever of any kind or character to charge it with the payment of such a debt." The Legislature having provided how her separate estate may be charged with such a debt, we think that this excludes any other method, or way, of making the debt a charge against her separate estate.

The Supreme Court of Mississippi, in the case of *Stephenson v. Holland*, 23 Miss., 265, held that when a statute prescribes a way by which a married woman may charge her separate estate for its improvement, or for other purposes, such statute must be pursued in order to make a debt a charge upon it," and this was, virtually, the holding of our own Supreme Court in 3 Head, 543, and in 10 Lea, 323.

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Our Code provides that the estate, both separate and general, of a married woman may be alienated in certain ways therein provided, and it has been uniformly held that she cannot be deprived of her landed estate, whether general or separate, in any other way than that provided by law, and the statute having provided a way, by the Act of 1881, chapter 67, by which to charge her separate estate with the payment of a debt created for its improvement, we think that it is exclusive and that it can be done in no other way than that pointed out by the Act of the Assembly.

As this method was not pursued by complainant, we think they have no right to maintain this bill upon the ground that her separate estate should be charged with the payment of the debt created for its benefit. It seems to us that a conclusive answer to complainant's contention lies in the fact that when this debt was created complainant then had no knowledge whatever that Mrs. Haverly had a separate estate in the land on which she was proposing to erect a building. She had such separate estate then, it is true, but complainant was ignorant of it and knew nothing of its existence, until April, 1912, more than two years after the debt was created. Then how could complainant contract with reference to the payment of its debt out of an estate the existence of which it was wholly and entirely ignorant? The theory upon which its learned counsel proceed is that there was an implied undertaking to charge the separate estate with the payment of this debt, or that the parties are presumed to have contracted with reference to its payment out of this estate; or that the law upon the facts of the case will imply an undertaking and agreement upon the part of a married woman to charge her separate estate with the payment of this particular debt. The complainant cannot imply by

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contract about a matter or thing the existence of which it is in total ignorance. The parties to the contract cannot be presumed to have had in mind an estate, of which one of them then had no knowledge, nor will the law raise an implied contract to charge such an estate for the payment of a debt created by a married woman for the reason that the law never raises an implied contract, except on facts known to both parties to the contract, and about which they entered into stipulations. And for these reasons we do not think that complainant's amended bill can be sustained and Mrs. Haverly's separate estate charged with the payment of the balance of this debt, on the ground that it was beneficial to it. The original bill, however, was evidently based upon the case of *Federlight v. Glass and wife*, 13 Lea, 481. It was held by Mr. Justice Cooper, in an opinion delivered by him for the Court, in that case, that where a married woman bought personal property and afterwards repudiated the contract, by pleading her coverture, that she would then hold the goods as the property of the vendors and would be required by a Court of Equity to return them to the owners, he said, inasmuch as the contract of sale was invalid, or a married woman repudiated the title to the goods, the title would then be in the vendors, and they might bring an action of replevin to recover them, or file a bill in Chancery for that purpose; and in such case a Court of Equity would compel her to return the property, if in her possession, or under her control, citing 6 Lea, 393, and 2 Tenn. Chan., 328. But, inasmuch as complainants in that case had not taken that course, but had pursued a different one, they were not entitled to any relief. Complainants, in this case, however, seek to recover possession of some of the goods they sold to Mrs. Haverly, amounting in value to \$195.75, which they claim had not at that time been attached to or

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worked into the house, which she was building, but they do not specially describe the articles they seek to recover, and content themselves with saying, in speaking in reference to these articles, "a sample of which is the bill of finishing hardware, listed on page 4, amounting to \$195.75, and a great many other articles not necessary to set out in the bill, as well as the two cultivators." Upon examining the account, filed as an exhibit to complainant's bill, we are unable to determine what pages reference is made when page 4 is designated. In order to recover possession of goods of this character in a lawsuit of this kind, it is necessary that they be specifically described, as in a writ of replevin, in order that the Court, and the officer executing the orders of the Court, may be able to know the goods, or articles, when he finds them, take possession of and restore them to the complainant, or rightful owners. There is no such description of these goods, or articles, either in the bill, or in complainant's proof, and for this reason no such relief can be granted by decree, as was asked for in complainant's bill. Had it been properly framed, and the articles sought to be recovered correctly described; and had the proof shown that Mrs. Haverly was still in possession of such articles and had not attached them to the freehold, so as to become a part thereof, then this Court could, and would, make a decree directing the return of them to complainant within a certain designated time and, on her failure to do so, direct a writ of possession to issue to the sheriff to take them and deliver them to the complainant. But in the present state of the pleadings and proof we will not enter such an order in this Court, and, in fact, it does not appear from the record whether Mrs. Haverly had the possession of these articles at the time the bill was filed and the proof taken, except from the unsupported statements of the

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bill. For all we know she may have disposed of them long ago, or she may have attached them to the house in the way and manner she intended when she bought them.

For these reasons we cannot grant complainant any relief on the original bill, and have reached the conclusion that the Chancellor was in error in granting the relief sought by the amended and supplemental bill, and his decree in all respects is reversed and complainant's bill is dismissed, with costs.

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PARK CITY v. W. E. DRUMMOND.

PUBLIC FUNDS. *Lien on same for services. Set-off.*

A public official—*e. g.*, a city attorney—who in his official capacity collects taxes assessed for public or corporate purposes, has thereon no lien for services or for salary such as he can assert and set-off against suit to recover the funds withheld by him.

FROM KNOX COUNTY.

Appealed from the Chancery Court of Knox County.
W. D. WRIGHT, Chancellor.

A. Y. BURROWS for Complainant.

SHIELDS & CATES for Defendant.

MR. JUSTICE HALL delivered the opinion of the Court.

THE original bill in this cause was filed by Park City, a municipal corporation, against the defendant, W. E. Drummond, its city attorney, who had been duly and regularly elected as such, to recover the sum of \$773.98, collected by him in his official capacity from the delinquent tax payers of said city during his term of office, which dated from May, 1910, to May, 1912, and which taxes he had in his hands at the expiration of his term of office.

The defendant filed an answer and cross bill, admitting that, while acting as city attorney for the complainant, he collected the sum of \$773.98 of its delinquent taxes, and that said sum had never been paid over to the

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city, but still remained in his hands. He averred, however, that the complainant was indebted to him, as its attorney, in the sum of \$1,160 for other legal services rendered in defense of certain law suits set out and specifically mentioned in a report filed as Exhibit "A" to his cross bill, and claimed the right to set off the amount thus due him against the amount of delinquent taxes collected by him and then in his hands; that in any event, he was entitled to retain the money so collected by him under an attorney's lien until the complainant paid the fees, which he alleged to be justly due him for the services rendered.

The complainant filed a demurrer to the cross bill denying the defendant's right to set off the fees alleged to be due him for services rendered it in other litigation against the taxes collected by him, or to hold said taxes under an attorney's lien until said fees were paid, because the taxes which the defendant had collected and held was a public fund belonging to said municipality, and was a part of the fund held by it in trust for the use and benefit of its citizens, which was devoted to the carrying on of the public objects and purposes of said municipality.

Upon a hearing the Chancellor sustained the demurrer, holding that the defendant did not have the right to set off the fees alleged to be due him from said municipality against the taxes collected by him in his official capacity, nor did he have the right to retain the same under a lien until the municipality should pay him the fees alleged to be due. The Chancellor also, upon the admissions of the defendant in his answer and cross bill that he had collected said taxes and had not paid the same over to the city, rendered a decree against the defendant for the same, and ordered an execution to issue thereon, but decreed that the cross bill might stand as an independent action by the de-

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fendant against the city to collect said fees alleged to be due him. The defendant excepted to this decree, and appealed therefrom to this Court and has assigned errors.

By the two first assignments of error it is insisted by the defendant that the Chancellor erred in not decreeing him the right to set off the fees due him by the city against the taxes which he had collected. In any event, it is insisted that the Chancellor erred in not allowing him to retain the tax fund then in his hands under an attorney's lien until the complainant should settle or pay the fees alleged to be due him.

We are of opinion, after a careful examination of the questions involved, that the defendant could not set off a private demand due him from the city against taxes collected by him for the city in his official capacity, and which belonged to the city, and must be held by it in a trust capacity for the public purposes of said municipality. The obligations were not mutual, and did not subsist between the parties in the same right and capacity. One was a private debt due the defendant, while the other was a trust fund due the city from the defendant in his official capacity, and necessarily belonged to the city, and must be held by it, when collected, in a trust capacity for the benefit of its citizens.

Mr. Dillon, in his valuable work on *Municipal Corporations*, says: "Taxes are imposts levied for the support of the government or for some special public purpose, authorized by it, and are not debts in the ordinary acceptance of the term." 5th Ed., Vol. 4, pp. 24-78.

"A city government, like that of a State, cannot be compelled, without its own consent, to accept its own obligations in lieu of taxes which are due to it. The principle is recognized everywhere that nothing but money can be received by a State or municipal government in discharge

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of its revenues, unless some special statute or ordinance has authorized it. The city government is for the benefit of the little public which it governs. It lives upon its taxes, and its first duty is self-preservation by the steady and certain collection of its revenues. A debt due from a city to one of its taxpayers is not a matter of lawful set off against the taxes due from such creditor, and cannot be enforced without the consent of the city." *Scovel v. Nashville*, 2d Shannon Cas., 264.

We think this rule is equally applicable to an official of a municipality who collects and holds the taxes of the municipality in his official capacity.

In Cyc., Vol. 34, 722, it is said: "Upon the ground that it is against public policy to allow a public officer to commingle his private claims with his official duties, as well as upon the ground that debts in order to be set off must be mutually subsisting between the parties in the same right and capacity, it is held that in an action to recover money received by an officer in his official capacity a debt due from plaintiff to the officer in his private capacity is not the subject of a set-off. Thus, a public officer, when sued for money which he has failed to pay over as required by statute, cannot set off a debt due himself from the municipality for salary in that office, or in another, or for fees, and in an action against a public officer upon a claim for which he is personally liable, he cannot set off a claim due the municipality in which he officiates."

In *Waterbury v. Lawler*, 51 Conn., 171, it was held that in an action against a tax collector by a township for the amount of a tax committed to him for collection, defendant could not be allowed to set off a debt due him from plaintiff.

In *State v. Floyd*, 28 La. Ann., 553, it was held that a person sued as tax collector for the proceeds of taxes col-

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lected cannot set off a claim for compensation for services performed in another office.

In *Moore v. People*, 37 Ill. App., 641, it was held that a justice of the peace, who has collected fines in cases pending in his Court, cannot set off any claim of his own against them for fees in the proceedings out of which they arose.

In *Harper v. Howard*, 3 Ala., 284, it was held that a justice of the peace, in an action against him to recover money collected by him in his official capacity, cannot set off costs due him in another case.

"A public officer cannot be permitted to blend his public duties with his private transactions. Therefore, if a collector be sued by a town for the amount of taxes placed in his hands for collection, will not be allowed to set off a debt due him by the town." *Waterman on Set-off, Recoupment and Counterclaim*, section 42.

"Taxes are not debts in the ordinary sense of that term, and their collection will, in general, depend on the remedies which are given by statute for their enforcement. Taxes are not demands against which a set-off is admissible." *Cooley on Taxation*, 13.

It is insisted by the defendant that his right of set-off in this cause is settled in the case of *Jones v. Miller*, 1 Swan., 153. In that case there was a motion by Miller, as trustee of Fentress County, against Jones, an attorney at law, in the Circuit Court of said county, for school funds collected by him, and which he had omitted and refused to pay over to the plaintiff. The amount claimed was \$268.00. Jones gave notice of set-off, setting forth in his notice various sums due him as fees for services rendered in sundry suits, some of which were for the recovery of school funds, and some for other purposes. He also claimed the right to set off against the claim of the

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trustee the sum of \$40.00 paid by him, out of the school fund collected, to E. L. Gardenhire, an attorney at law, as a fee for his services in a certain suit for the recovery of a school fund, representing that he had contracted this debt at the instance and request of the plaintiff. The trial Judge refused to allow the defendant to set off the claims embraced in his notice, and declined to hear proof on any of them, except as to fees due the attorney for collecting the said sum of \$268.00, for the recovery of which the motion was made. The defendant Jones appealed. The Supreme Court, in disposing of the question, said:

"As to the matter of set-off, it must be of the same nature and in the same right as the debt or demand for which the plaintiff sues; and such in part, according to the facts assumed, is the character of the set-off insisted upon in the present case. The plaintiff having no private right to the fund for which he sues, demands it as a trustee; and if there be reasonable and just fees due from him, in his character of such trustee, to the defendant, there is no reason why they should not be allowed as proper matter of set-off."

Continuing, the Court said: "For it is in fact the balance, after paying such charges, if any there be, that is equitably due to the plaintiff as the trust fund. The charges must be, of course, for attention, at plaintiff's request, to suits for the recovery of the school fund; the services must have been fully rendered before the institution of this motion, and the fees in themselves just and reasonable. For the trustee would not be authorized upon the credit of the fund to make improvident retainers, or to pay extravagant fees. As to fees claimed for suits not determined, *and for suits not relating to the school fund, but to other interests, they can have no connection with the present case.*"

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So it will be seen that the Court only allowed the defendant in that case to set off fees and expenses incurred growing out of the collection of the school fund, and not fees due for services rendered in other suits not connected with the collection of the school fund.

No part of the fees which the defendant seeks to set off against the complainant's claim in the suit at bar grew out of the collection of the taxes for which complainant sues, and said fees are in no way connected with said taxes, but all of them are claimed for services rendered in entirely independent suits for and against the complainant.

As to the contention of the defendant that he has an attorney's lien upon the taxes in his hands, and is entitled to retain said taxes until the complainant pays the sum due from it to him.

We are of opinion that the defendant has no lien on said funds in his hands. It is a general rule of law in this State that an attorney has a lien upon property recovered or protected by his services, and upon money recovered by his services, which may be declared by an order in the cause in which the services are rendered. *Hunt v. McClanahan*, 1 Heis., 503; *Pleasant v. Kartrecht*, 5 Heis, 694; *Railroad v. Wells*, 104 Tenn., 59.

The fees alleged to be due the defendant, however, and for which he insists he has a lien on the tax fund sought to be recovered of him by the city, did not grow out of the collection of said taxes, and, as before stated, had no connection whatever with them, and cannot, therefore, be declared a lien on said taxes.

We know of no decision holding that an attorney is entitled to have a lien for services fixed on a fund, in the collection of which, the particular services for which the lien is claimed were not rendered, but are services growing out of an entirely independent matter.

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It is insisted by the third and last assignment that the Chancellor erred in rendering a decree against the defendant Drummond for \$773.98, the amount of taxes admitted by him, in his answer and cross bill, to be in his hands, and in ordering an execution to be issued upon said decree. It is insisted that, upon overruling the demurrer, the Chancellor should have waited until the question of the defendant's fees could be determined and fixed under the cross bill, before rendering a decree against him for the taxes due the complainant.

We are of opinion that there was no error in this action of the Chancellor. The defendant admitted the amount of taxes claimed by the complainant, and only sought the right of set-off against said taxes, or the right to retain the fund in his hands until the city paid the fees alleged to be due him. Holding as we do, that he had no such right, we think there is no reason why the city should wait for its taxes until the fees alleged to be due defendant could be litigated, fixed and determined. The defendant could not be prejudiced by the action of the Chancellor, if we are correct in holding that he was not entitled to the right of set-off, or to retain the fees under an attorney's lien until the city paid him the fees alleged to be due in the independent litigation. The Chancellor directed that the cross bill stand as an independent bill for the collection of the fees alleged to be due the defendant, which are disputed by the complainant, and this matter can be determined by a subsequent decree.

It results that the decree of the Chancellor will be affirmed, and the cause remanded to the Chancery Court to be further proceeded with.

Bank v. Taylor.

UNION BANK, GUARDIAN, V. REED TAYLOR, ET AL.

1. ASSIGNMENTS OF ERROR. *Time of filing. Motion to affirm.*

It is now the practice of the Court of Appeals to affirm decrees and judgments in cases appealed for failure to file assignments of error in time whenever motion to affirm is made by appellees, unless sufficient excuse for the delay, shown by affidavits, be shown.

2. SAME. *Excuses. Defective records.*

Delay in filing assignments of error attributed to defects in the record is not excused if the record defects were occasioned by the fault or inattention of appellant.

FROM ANDERSON COUNTY.

Appealed from the Chancery Court of Anderson County. HUGH KYLE, Chancellor.

SILAS ROGERS for Appellant.

C. J. SAWYER, J. U. UNDERWOOD, WALLACE & BURNETT for Appellees.

MR. JUSTICE WILSON delivered the opinion of the Court.

WHEN this case was reached on our docket, a motion was made by complainant to affirm the decree of the Chancellor because no errors had been assigned. This motion was sustained.

Defendant Rogers, also counsel of defendant, Taylor, was in Court at the time of the affirmance, and requested that the decree of affirmance be not ordered and entered, and stated that he would file assignments of error.

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The Court stated to Mr. Rogers that the decree of the Chancellor would be affirmed, but that he could apply by petition, verified, asking that the decree of affirmance be set aside, and if his petition presented legal reasons therefor, the affirmance would be set aside and the case disposed of in regular order.

May 25, 1915, defendant Rogers filed a petition asking that the decree of affirmance be set aside and that he be allowed to assign errors and that the case be disposed of in regular order upon its merits.

We have examined the petition of defendant Rogers, and are of opinion that it presents no legal excuse for not having assigned errors in time as required by the rules of this Court. It has never been the policy or disposition of this Court to avoid the hearing and deposition of cases upon their merits, but where records have been filed a month or more before the Court convenes, and no errors have been assigned when the cases are reached on the docket and counsel of the opposite party demand or ask for an affirmance because errors were not assigned in time, we must, if our rules amount to anything, in such cases, affirm the decree or judgment of the Court below.

In this case, as above stated, the petition presents no sort of legal excuse for not having filed assignment of errors in time in accordance with the rule of this Court. The record in this case was filed in this Court early in December, 1913. It was decided at the October term of the Chancery Court, in 1913, of Anderson County. The excuse presented for not having assigned errors is, in substance, that only a partial transcript of the record was filed in this Court. If this be so, it seems to us, that petitioner and defendants are to blame. They were the defendants in the Court below and a decree was entered against them and they appealed to this Court. It seems

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to us that it was their duty, under their appeal, to see that a complete transcript was made out and filed in this Court.

It is said in the petition that petitioner's solicitor was not notified of the filing of the record until after the Anderson County cases had been reached on the docket, and in less than thirty minutes before this case was called for hearing, and, hence, it was impossible then to file assignments of error in the case. In other words, the sole excuse in this case is, that a part of the transcript being filed in this Court and not all of it, as required by law, the filing of only a part of the transcript is not a filing of the transcript, as contemplated by the rule; but, as before stated, the fault of defective transcript being filed in this Court, if any fault existed, was that of petitioners.

It follows that the decree of affirmance must be sustained on the ground stated. But in view of the attitude of the case and the insistence of learned counsel of defendants, the Court has carefully examined the record in the case, and after doing so, we have been wholly unable to find any reversible error in the action of the learned Chancellor. So, if the decree of affirmance was set aside and the case taken in on briefs, no different result would be reached.

The petition for setting aside the affirmance is dismissed with cost.

King v. Dunlap.

LINK KING v. I. W. & LEWIS DUNLAP.

1. *DOG. Action by owner for poisoning. Running at large. In the chase.*

A dog which, with the consent of the family of the absent owner, is loaned to a foxhunter who at once puts him in a chase, is not running at large in violation of Act 1901, Ch. —, and if while in the chase the dog is killed by the negligent spreading of poison, the owner may sue the party responsible therefor.

2. *TRIAL. Directed verdict before conclusion of offer of evidence by plaintiff.*

Trial judges should not direct verdicts before plaintiff has concluded his introduction of evidence if the evidence in reserve and offered tends to explain away any adverse presumptions which may have arisen.

3. *MOTION FOR NEW TRIAL.*

Necessary, to have review of action of trial judge in directing a verdict.

FROM BLOUNT COUNTY.

Appeal in error from the Circuit Court of Blount County. SAM C. BROWN, Judge.

BROWN & JOHNSON for Plaintiff in Error.

GAMBLE & CRAWFORD for Defendants in Error.

MR. JUSTICE WILSON delivered the opinion of the Court.

THIS suit was commenced by Mr. Link before a justice of the peace against defendants in error to recover dam-

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ages from them for killing his hound dog by poison on or about December 30, 1912.

The justice of the peace rendered judgment in favor of Mr. King against defendants in error for five dollars, and both parties appealed to the Circuit Court of the county.

"The case came on for trial before a jury in the Circuit Court, and after hearing the evidence of four witnesses introduced on behalf of Mr. King," states the entry made by the Court, "defendants below moved the Court to direct a verdict in their favor because under the undisputed facts shown in the plaintiff's testimony the plaintiff has violated the law in allowing his dog to run at large contrary to the statute, for the death of which dog plaintiff sues in this case, and the Court being of opinion that the plaintiff had violated the law and was thereby guilty of a misdemeanor in permitting his said dog to run at large contrary to the statute, and that the plaintiff could not come into Court and ask damages for the death of said dog, and that he should be repelled for this reason.

The Court therefore sustains said motion, and it is therefore considered by the Court that said motion be sustained and that the verdict of the jury be directed in favor of the defendants, which was accordingly done.

It is therefore ordered by the Court that plaintiff's suit be dismissed and that the defendants have and recover from plaintiff all the costs, for which execution will issue.

To which said action of the Court in granting peremptory instructions, and dismissing his said suit, the plaintiff excepted and prayed an appeal to the next term of the Court of Civil Appeals which meets at Knoxville, Tenn., and said appeal is granted and plaintiff is given twenty days in which to prepare and file his bill of exceptions and to perfect his said appeal."

This is the only minute or record entry appearing in the case. No motion for a new trial was made.

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A bill of exceptions was afterwards prepared, approved by the trial Judge, and filed in the case.

If we could look to the bill of exceptions and the evidence contained in it, we would be of opinion that plaintiff in error was not allowing his hound dog and pedigreed fox-chasing dog, of the red bone breed, according to the testimony, and well trained for his age, he being about thirteen months old and worth fifteen dollars, according to all the testimony, to run at large.

As a matter of fact, this splendid pedigreed hound dog was at the home of plaintiff in error when he left there about dark on December 30 to wait on a sick neighbor, and while he was thus absent from home, Mr. Gus Dunlap came along and with the assent of the family of plaintiff in error put his dog in the fox chase.

There is no question from the proof as to the fact that defendant in error Dunlap put out poison in a dead rabbit, and which poison the dog, in eating the rabbit put into his stomach and was killed thereby, but as no motion was made for a new trial, and as we cannot know what the facts were without looking into the bill of exceptions, we cannot entertain the appeal under the decisions of our Supreme Court.

Taking the bill of exceptions into consideration, the learned trial Judge had no right to stop the introduction of evidence in its midst and direct a verdict, but no motion for a new trial having been made, we cannot consider the bill of exceptions.

The result is that the case will be dismissed with costs.

Hutton v. Waters.

MRS. E. J. HUTTON v. H. E. WATERS ET AL.

Writ of certiorari denied by the Supreme Court.

(*Jackson*. April Term, 1914.)

1. CONTRACTS. *Interference with and inducing breach. Action.*

A party who intervenes and induces the breach of a contract may be held liable in damages to the party who desires that the contract be performed.

2. CONSPIRACY TO DESTROY BUSINESS.

Two or more parties who conspire wrongfully and maliciously and without just motive to break up and destroy the established business of another may be held responsible in damages.

3. DEMURRER TO DECLARATION. *Question arising.*

The point arising upon demurrer to a declaration is whether it sets forth, however inartificially, a legal right in the plaintiff and wrongful interference therewith upon the part of defendant.

FROM WEAKLEY COUNTY.

Appeal in error from the Circuit Court of Weakley County. JOS. E. JONES, Judge.

L. E. HOLLIDAY for Plaintiff in Error.

R. E. MAIDEN and A. B. ADAMS for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

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FROM the judgment of the Circuit Court of Weakley County sustaining a demurrer to her declaration and dismissing her suit, Mrs. Hutton prayed and perfected her appeal in error, and is here insisting that this judgment should be reversed and the cause remanded for issue and trial. We shall in this Court speak of the parties as plaintiff and defendants, just as they appeared in the lower Court.

The primary question for us to determine is whether the declaration sets forth one or more causes of action or grievances of legal cognizance. It is not for us to decide whether the pleading is in proper form, and whether there can be a recovery on all the matters set forth, but whether the pleader has averred facts which demand an issue and trial. It must also be remembered that we cannot anticipate the legal effect of what may be urged upon a trial as the viewpoint from which to pass upon the sufficiency of a demurrer. Nor is it incumbent upon us to interpret the declaration upon the assumption that certain defenses which are complete answers will be relied upon at the hearing. Rather, it is our duty to examine this declaration and determine from its face whether it shows the existence of any right upon the part of the plaintiff and a wrongful and actionable invasion of that right upon the part of the defendants. It is also well to remark that we cannot well write all the law upon any subject in one opinion.

This is a peculiar and somewhat novel case in this jurisdiction, if we for the time being put out of view a certain decision in this State to which reference will hereafter be made. A voluminous opinion could be written upon the questions arising, but we have reached the conclusion that we should not undertake to prepare a treatise upon this subject or to analyze all the decisions and authorities which may have a bearing. It shall be our endeavor to re-

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duce to reasonable length and simple form some of the rules which we think deducible from the authorities. We shall, however, attempt to call attention to some of the limitations which surround the right or rights of action set forth in the declaration.

Discarding the arrangement and verbiage observed by the pleader in drafting this declaration, and reducing it to simple averments of fact, we find that it substantially sets forth the following: Mrs. Hutton is a widow and the keeper of a boarding or rooming house. In 1910, she opened up in Martin, Tennessee, a house of this kind for the reception and entertainment of pupils and teachers of the Hall-Moody Institute, an educational institution of note located in that town. Of this institution, Prof. Waters is the principal and the chief officer. The other defendants named are officers or directors or patrons or sympathizers thereof. It was averred that one James Wilson was a boarder at the house of plaintiff; that Prof. Waters and he had a difficulty, and thereupon Prof. Waters demanded that Mrs. Hutton decline to retain Wilson as a boarder and customer and that she refused to dismiss him. It was also averred that Prof. Waters objected to her prices or arrangements, and demanded that she conduct her boarding house to suit him. When Mrs. Hutton declined to yield to these requests, it is alleged that Waters and his co-defendants entered into an unlawful and malicious conspiracy for the purpose of breaking up her business as a boarding house keeper, and that in carrying out this unlawful and harmful design the conspirators began to induce boarders with whom she had contracts to leave her, and to cease to patronize her; that they got in communication with pupils who were destined to Mrs. Hutton's house and with whom she had entered into contracts for board, and induced and caused them to break their

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contracts; that with respect to some of her boarders the defendants wrongfully and maliciously coerced or threatened to suspend them from school unless they ceased boarding with her, and that they would meet incoming pupils at the station and otherwise come in contact with them and wrongfully and maliciously proceed to beg them to go elsewhere. It is then alleged that this combination or agreement was entered into wrongfully and maliciously and not for the purpose of promoting trade interests or protection of property rights, but for the purpose of interfering with plaintiff's right of free trade, thus causing the destruction of her business. She averred that she was a respectable woman, and the keeper of a nice, decent and orderly hotel, and, in substance, that the defendants were without legal excuse or justification for interfering with her business.

This declaration may be divided into three parts, or considered as setting forth three grounds or grievances: 1. The wrongful and malicious inducing of the breaking of specific contracts for board which were subsisting between Mrs. Hutton and several named boarders. 2. A conspiracy wrongfully and maliciously entered into for the purpose of harming and injuring her by refusing patronage and importuning and inducing prospective patrons to decline to enter into trade relations with her. 3. A conspiracy wrongfully and maliciously to drive her out of the boarding house business and to destroy her right of freedom to trade.

If plaintiff had a right of action for any one of the above grievances the learned trial Judge was in error in sustaining the demurrer and dismissing the suit. Assuming the averments of the declaration to be true, we are of opinion that a system of jurisprudence which would not afford a party in her situation some ground of action

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would not deserve the name. Especially do we feel so in this day of ethical growth and of broadening consideration for individual right, notwithstanding a socialistic spirit which sometimes crops out. The common law maxim, *ubi jus ibi remedium*, should still be a living force.

With respect to the first result of the above analysis, namely, that of a wrongful and malicious interference with contractual relations, we do not apprehend that there can be any doubt about the right of Mrs. Hutton to wage a suit for damages. We are aware that such rights of action are of comparatively recent growth, and that many jurisdictions will deny them justiciability. But this doctrine has been firmly settled in this State, and cannot well be controverted: *Donnelly Co. v. Jackson Bros.*, 2 Tenn. C. C. A., 408, and cases therein cited, particularly the English authorities. There is no room for a quarrel about the justness and equity of such a doctrine. It is the height of unwisdom to insist that a man or a set of men may designedly and wickedly deprive another of the fruits of a subsisting contract and yet escape responsibility for the entailed consequences. We have read scores of cases discussing this subject in connection with this investigation and prior considerations of this question, and have reached the conclusion that this rule cannot be gainsaid.

With respect to the second and third grievances, a wider field is opened up and possibly greater uncertainty as to jural aspects may be encountered. We chose to treat of the second and third grounds as coalescing and making a pointed charge that the defendants, without just cause or excuse and in the absence of the motive of self-interest or self-protection or for the promotion or protection of trade, entered into a conspiracy for the purpose of destroying plaintiff's business by inducing her boarders to leave her

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through importunities and moral coercion and quasi-authority, and by intercepting prospective customers and inducing them to refuse to trade with the plaintiff as a boarding house keeper.

It is ingeniously argued by very learned counsel for defendants that the declaration fails to aver that the means used to carry out the conspiracy partook of a fraudulent or violent character; and it is urged that there would be no legal ground of complaint at mere importunity or persuasion. It is also forcibly argued that the declaration simply sets forth the case of a quasi-employer or director who had an interest in the moral welfare and comfort of the patrons of the school, having the right to dictate as to the places at which the pupils should board and the prices they should pay and the people with whom they might come in contact. It may save time and trouble to concede that as a matter of law this latter contention has very great merit, and we must not be understood as denying that the defendants may urge this in justification and excuse if done in good faith and in reality as the motive which prompted the several acts complained of by Mrs. Hutton. But we shall recur to this. We are concerned now with the case as set forth upon this feature by the declaration. While the declaration uses a great many adjectives and expletives, we are of opinion that the averments that this combination or agreement was entered into unjustifiably and without excuse and done with intent to harm Mrs. Hutton and not for the purposes of promoting the interests or protecting the rights of the conspirators must be taken as material and true. Now, what are the rights of the parties? It is earnestly contended that the questions thus arising were definitely settled by the Supreme Court of Tennessee in the case of *Payne v. Railroad*, 13 Lea, 507. An examination of the majority opin-

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ion in that case will bring to light many shades of thought which go very far towards sustaining this contention.

If we were to accept this opinion and accord it hearty commendation it might be a complete answer to the demands of the plaintiff. But it cannot be too often repeated that one of the doctrines of the common law is that no question is decided until the exact state of facts calling for judicial utterance be shown. No case can be treated as absolutely controlled by a previous decision unless the facts are substantially the same. In other words, there is no such thing in the common law as *authoritative deduction* from a previous adjudication. Per Lord Halsbury in *Quinn v. Leatham*, 1 British Ruling Cases, 197. But if we were to consider the Payne case as correspondent in all respects with the matter at bar, we would not hesitate to express our disapproval of the majority opinion and, although an inferior Court, would decline to follow it until it met the approval of the Judges who now occupy, or have in recent years occupied, our highest Court. This tribunal has once before criticized the Payne case: *Donnelly v. Jackson Bros.*, *supra*, and would not hesitate to do so again. We have taken occasion to ascertain the status of the Payne case in the eyes of jurists and commentators, and have discovered that it is not generally approved; and in particular that it was characterized by the learned annotator of the L. R. A. series of reports as out of line with the current authority. This editor emphatically stated that the minority opinion prepared by Judge Freeman, and assented to by Judge Turney, was the sounder and better. See 62 L. R. A., 710, note. Pursuing our criticism of the Payne case, it is well that we recall that it is out of harmony with the legislative spirit against monopolies, combinations and restraining agreements which has been manifested in the last twelve or four-

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teen years. In fact, if legislative declarations be taken as evidences of a public policy which must always be looked to and promoted by the judiciary, it is clear to us that any combination or agreement having for its object the destruction of a business or an unjustifiable interference with the freedom of trade enjoyed by any citizen if followed by damage is actionable. See the case of *Standard Oil Co. v. State*, 117 Tenn., 618, and also the Plumbers case, 103 Tenn., 99. It should be borne in mind that this latter case was really decided upon common law principles rather than legislative declarations. But we conceive it to be an exceedingly instructive case upon another feature which we are now going to mention.

It is insisted by learned counsel that Prof. Waters and his co-defendants were clearly in the exercise of their legal rights when they interfered with Mrs. Hutton's boarders and induced them to go elsewhere; and that they were also within their rights when they morally coerced or threatened her pupil customers with expulsion from the school if they did not cease to board with her. This may or may not be true. But we decline to adjudge that they have such right in advance of a hearing. In other words, we decline to decide before development of the facts that these parties were acting justifiably and upon a sufficient excuse or upon moral or financial considerations; and, having reached this conclusion, there necessarily follows an adjudication that the declaration even upon this feature must be met by defense and by proof. It is said in this case, just as it has been urged in practically all of the decisions upon this point in this country and in England for the last twenty-five or thirty years, that anyone of the defendants had the right to refuse to patronize or aid Mrs. Hutton, that they individually had the right to counsel or advise incoming pupils not to go to her boarding house;

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and that as this right might be lawfully exercised by any one, it might be exercised by any number pursuant to a combination. Reduced to its last analysis, it is the argument that if one party could not be sued for counseling another to withhold patronage, any number of them could combine and do this same thing with impunity. Some Courts have taken this view, but we are of opinion that the best juristic thought of this nation and of England is against such proposition, and that the contrary one of responsibility for consequences whenever the combination has for its object the destruction of the business of the victim should be upheld. It is true that any individual might have counseled the boys not to go to the boarding house of Mrs. Hutton in the absence of a contract for board, and would not be responsible, especially if there were no bad motive; and probably there would be no liability even if the motives were bad or malicious. But to say that an aggregation of influential men can conspire for the specific purpose of destroying a party's freedom of trade and taking away his means of livelihood and not be responsible for the consequences is abhorrent to our sense of justice and right, and we decline to give it our endorsement. The reader must bear in mind that we are talking about a conspiracy or combination actuated by a wrongful and harmful motive; namely, that of destroying the trade of an individual to gratify the spleen or ill-will of the conspirators, and without any moral design of improving the parties with whom they interceded. As stated by a number of authorities, an individual may be able to combat the malice and ill-will of one party who is determined to interfere with his trade or custom, but he may not be able to withstand a combination of a number of prominent and influential persons who have decided that their victim should be commercially lamed. This is

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in accord with the modern spirit of justice and fair dealing; the contrary partakes of a barbarism and a hardness of heart which no progressive judiciary should countenance. There has been no authoritative and direct declaration by our Courts upon this subject of which we are cognizant. But a close examination of the Plumbers case, *supra*, will warrant the aligning of our State along with those jurisdictions in which the doctrine of liability for combinations to destroy the trade of another is upheld. Another evidence of the broad spirit of our jurisprudence in the matter of the granting of freedom of contract and of trade relations is evidenced by many decisions in this State declaring void all municipal ordinances and even statutes which squint at market restrictions or the controlling of prices or patronage. We wish to refer approvingly to the following authorities from other States: *Railroad v. Pa. Co.*, 19 L. R. A., 387, 395; *Brown v. Pharmacy Co.*, 115 Ga., 429; 57 L. R. A., 547; 90 Am. St. Rep., 126; *Pickett v. Walsh*, 6 L. R. A. M. S., 1067 (a Mass. case); *Heim Brewing Co. v. Belinger*, 71 S. W., 691; *Cote v. Murphy*, 23 L. R. A., 135; *Hawardon v. Youghiogheneay Coal Co.*, 55 L. R. A., 828; *Stevens Wire Co. v. Murray*, 80 Fed., 811; *Lower v. Federation of Labor*, 139 Fed., 71; *Doremus v. Henessy*, 176 Ill., 608; 43 L. R. A., 976; *Berry v. Donaven*, 5 L. R. A. N. S., 899; *Curran v. Galen*, 37 L. R. A., 700, 743, and the English case of *Quinn v. Leathem*, *supra*, and cases therein cited and discussed, particularly the preceding case of *Allen v. Flood*. We wish particularly to call attention to the cases brought under review by the learned annotator of the L. R. A. series in 62 L. R. A., beginning at 694. To this should be added an interesting discussion of this subject in *Martell v. White*, 64 L. R. A., 260.

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Recurring to another aspect of this feature of the case; namely, that of the right of an individual to counsel or advise another not to patronize a certain individual, the best and most enlightened jurists take the view that while an individual may himself refuse to have trade relations with another because of dislike toward the party, he cannot impregnate others with his venom and induce them to coöperate with him in acts or efforts to drive away the trade of their mutual victim. Some of the Courts even go to the extent of denying an individual who for malicious reasons refuses to trade with another the right to importune even a friend to withhold his custom; and these authorities are not far from the right, if at all wrong. But we are not called upon to decide this point in this controversy. A careful analysis of the decisions referred to warrants the conclusion that any combination or agreement between or among individuals for the specific purpose of doing *wrongful and intended harm* to another in the matter of his trade is actionable. The only qualification is that if the parties to the agreement are actuated by justifiable motives or excuses no liability ensues. But the question as to what are justifiable motives or excuses has never yet been fully determined, and cannot well be in advance of proof. The most rational view seems to be that if the parties in the combination have a *trade interest* to subserve, they may resort to persuasion and importunity short of fraud or violence to attain their ends, even to the extent of inducing customers who are not under specific contracts to leave or cease relations with the proscribed party. It seems also to be generally accepted that if there be such relation between the conspirators and the parties whom they approach as to justify, upon legal, financial or *moral reasons*, an approach, there can be no liability. But this is a matter of

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defense to a charge that an agreement was unlawful, wicked, malicious and made with the intent to injure and without justification. Particularly apposite are two decisions from the State of Texas, *Delz v. Winfree*, 80 Texas, 400, 16 S. W., 111, and a subsequent decision in the same case reported in 25 S. W., 50. In the first of these decisions it was held that an agreement to appeal to patrons of a certain dealer not to patronize him, if made with intent to injure him and destroy his business, was actionable. In the second case it was held that the proof developed sufficient moral and legal reasons for having entered into the combination.

Learned counsel for defendants also insist that they are charged with doing that which they had the right to do, and that the averment that their performances were characterized by malice, adds nothing to their responsibility. It seems to be generally accepted as true that if parties do that which they have the legal right to do, their motive for so doing is not material or controlling. In other words, the absence of malice will not make illegal an act which would otherwise be legal. This seems to have been settled in the great case of *Allen v. Flood*, 17 Eng. Rul. Cas., 284. But this doctrine is not universally accepted. We are of opinion, however, that the plaintiff is not driven to a reliance upon malice alone as the gravamen of her suit. She sets forth an invasion of her legal right to a free market, and the declaration sufficiently avers that the defendants had wrongfully and maliciously conspired, without any moral, financial or legal reason, to visit unwarranted harm upon her. Hence, we have an averment of a combination to deprive her unjustifiably of an undoubted right. Malice certainly lends color to the agreement and to all the acts

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made in pursuance thereof. But the case as made is far from being dependent *solely* upon the presence of ill-will.

It seems to us that learned counsel for defendants look at this case from an improper standpoint. If the situation and the supposed rights of the defendants alone be regarded, as a matter of course the foundation for Mrs. Hutton is not very strong. But it should never be forgotten that in dealing with such questions there should first be determined the rights of the plaintiff, and then ascertain the correlative duty of the defendants with respect to those rights. No one can deny that Mrs. Hutton had the right to open up and maintain a boarding house in the town of Martin. This was a freedom of trade which can be yielded only upon legislative declaration that it is to the public interest that she and her kind be regulated or restrained or limited in their sphere. But to say that because she has incurred the ill-will of a certain element, she must be deprived of sustenance and driven to seek other fields is not to be tolerated. A recurrence to first principles and early institutions is a fine thing to do occasionally. Freedom of trade in the sense of a right to go into the village market and sell or solicit trade was a right recognized at an early age, interference with which for revengeful or malicious motives was not allowed. This principle should be reaffirmed and enforced in societies of the highest development.

It may be well to reiterate for the sake of clearness that this educational institution has the right, in the interest of good government and the maintenance of discipline, to counsel or advise or even require the pupils to board within certain spheres or at certain places. This right must not be denied the defendants, and it is not intended by this opinion to deny them this right. Granted this right, it must not be understood as justifying the deliberate and mali-

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cious inducing of others to breach valid, subsisting contracts for board. And yet we do not decide in advance but that there may have been moral and disciplinary reasons for causing the boarders to leave. We leave this to be debated and worked out in the lower Court and for subsequent discussion should the case ever again reach us.

We wish, in conclusion, to refer to the text, Cyc., Vol. 8, pages 646, 650 and 652, as containing succinct and very pertinent statements of the propositions which we conceive to be applicable and controlling. In particular, we wish to call attention to page 650 and note, upon the effect of the absence of competitive reasons or financial betterment or bona fide motive as rendering actionable a conspiracy to destroy the business of another. The decisions referred to by learned counsel for defendants have as a matter of course been taken into consideration by us, but have not been deemed to be controlling. The most pertinent one was that of *Guethler v. Altman*, 26 Ind. App., to which we have not had access. But we do not believe that decision is in line with the policy adopted or that should be adopted in our State. Besides, we have here the added feature of inducement or importunity to break contracts. A feature upon which many authorities, including the Payne case, can be distinguished and shown to be inapplicable to the matter before us for consideration, is to be noted here. As we have intimated, there is quite a difference between an individual owner or employer determining that neither he nor any of his employes, servants, or wards shall trade with a certain dealer, and an entering into of a conspiracy with others for the avowed purpose of destroying the patronage of such dealer. It might be that those in charge of a corporation might regulate its affairs to such an extent as to deprive a certain dealer of his patronage from those who are under

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the control or owe obedience to the corporation, but we refrain from deciding this proposition as governing the subsequent disposition of this case, for the reason that the declaration presents a case of deliberate conspiracy among quite a number of individuals who may or may not be concerned in the management of the corporation. The case of *Hospital v. Vance Lbr. Co.*, 33 L. R. A. N. S., 1034, has direct bearing upon this question.

But we repeat that it must be understood that it was incumbent upon each and all defendants to recognize and respect the contract rights of Mrs. Hutton.

It must be understood that what we have said in the foregoing opinion is restricted to the case of combinations and conspiracies among people other than members of labor unions to drive an individual out of business. We refrain from entering into a discussion of the extent to which boycotts by labor unions are valid.

The judgment of the Circuit Court sustaining the demurrer and dismissing the suit is reversed and the cause is remanded for issue and trial not inconsistent with the views expressed in this opinion. Defendants will pay the costs of this Court.

On account of relationship Judge Hall took no part in this decision.

Kelley v. Kelley.

LAURA F. KELLEY v. F. M. KELLEY.

Writ of certiorari denied by the Supreme Court.

1. **DIVORCE.** *Equity jurisdiction to set aside decree.*

That a court of equity has jurisdiction to set aside a decree of divorce obtained by fraud is well established.

2. **SAME.** *Diligence required.*

But the defendant must proceed with reasonable promptness to have the decree annulled. A delay of three years after knowledge of the rendition of the decree is too great.

FROM SHELBY COUNTY.

Appealed from the Chancery Court of Shelby County.

RALPH DAVIS for Complainant.

F. J. LOVEJOY for Defendant.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS is a bill filed by Laura L. Kelley against the defendant, F. M. Kelley, to set aside a decree for divorce upon the ground that the same was obtained by fraud.

A demurrer was filed by the defendant, which was overruled by the Chancellor, and he has appealed to this Court and has assigned errors.

The petition for divorce was filed in the Circuit Court of Shelby County, on April 3, 1907, and was styled "*G. Kelley v. Laura Kelley*," and alleged that complainant and defendant were married in Lawrence County, in the State

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of Ohio, in the month of May, 1886; that in December, 1904, defendant, being a mechanic, decided to move to Memphis, where he could get better wages and steadier employment, and tried to induce his wife, the complainant in the present cause, to move to Tennessee with him, which she declined to do, and had since refused to remove to said State with defendant, and had willfully absented herself from him for a period of two whole years next before the filing of said petition; and that her refusal was without cause on his part.

The bill further alleged that since the month of December, 1904, when the complainant positively refused to remove to Tennessee with the petitioner, he had not lived or co-habited with her. The complainant was brought before the Court in the divorce proceeding by publication duly made.

Complainant, in her bill to set aside said decree of divorce, alleged that the allegation contained in the petition for divorce filed by the defendant in the Circuit Court of Shelby County, to the effect that the complainant refused to remove with him to Tennessee, was absolutely false, and was made by the defendant for the fraudulent purpose of obtaining a divorce from complainant; that the facts were that complainant and defendant were married in Lawrence County, in the State of Ohio, in the month of May, 1886, where they lived for about six months and then removed to the city of Huntington, in the State of West Virginia, where two children were born to them as a result of said marriage; that on September 8, 1905, defendant, without cause, left complainant and their children at Huntington, West Virginia, and removed to the city of Louisville, in the State of Kentucky, and upon learning that defendant was in the city of Louisville, she followed him to that city for the purpose of having the

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defendant to make provisions for the support of herself and their children, when she was advised by counsel for defendant, that if she would return to Huntington, West Virginia, defendant would send her money for the support of herself and their children, which he failed to do; that she, thereafter, again went to Louisville to see the defendant with a view of persuading him to provide for the support of herself and their children, and upon defendant agreeing to send her the sum of \$20 per month, she again returned to her home at Huntington, West Virginia; that this last visit to see defendant was in June, 1906; that in June, 1908, she received information that defendant had removed to the city of Mt. Carmel, in the State of Illinois, to which city she went for the purpose of seeing the defendant, and was informed that he had obtained a divorce from her in the city of Memphis, in April, 1907, and was married to another woman.

The present bill to set aside said decree of divorcement was not filed by complainant until January 25, 1911, nearly three years after she learned of the decree of divorce rendered in the Circuit Court of Shelby County.

It was insisted by the demurrer that the bill should be dismissed for laches on the part of the complainant, which appeared on the face of her bill, and which was wholly unaccounted for in her bill to set aside the decree of divorcement.

We are of opinion that the demurrer should have been sustained. The power and jurisdiction of a Court of Equity to set aside decrees of divorce obtained by fraud has been recognized in a number of cases in this State. *Wills v. Wills*, 104 Tenn., 382; *Thomas v. King*, 95 Tenn., 60; *Chaney v. Bryan*, 15 Lea, 589; *Gettys v. Gettys*, 3 Lea, 260.

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We are of opinion, however, that the application should be promptly made by the person aggrieved by such decree, after he has knowledge of the fraud. Unreasonable delay of the party in making the application constitutes laches, and relief in such a case should not be granted, especially in a case where the setting aside of the decree will likely work injury to an innocent person who may have contracted marriage with the person in whose favor the divorce has been granted. *Graham v. Graham*, 54 Washington, 70, 18 Am. & Eng. Ann. Cas., 999; *Earle v. Earle*, 91 Ind., 27; *Nicholson v. Nicholson*, 113 Ind., 131; *Colby v. Colby*, 59 Minn., 432, 50 Am. St. Rep., 420.

At least, good cause should be shown for the delay in making the application. The bill in the present cause shows that the complainant acquired knowledge of the divorce proceeding had in the Circuit Court of Shelby County in 1908, and learned that defendant had married again. She waited practically three years, after acquiring knowledge of these facts, before she filed the present bill to set aside the divorce decree, and does not undertake to account for this delay in her bill. It may be true that children have been born to defendant as a result of his second marriage, and that such children, as well as the wife by the second marriage, would be greatly prejudiced by the setting aside of the decree at this late day.

The decree of the Chancellor is reversed, and the bill will be dismissed with costs.

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A. M. CASH v. R. R. RUSSELL.

Writ of certiorari denied by the Supreme Court.

(*Knoxville*. September Term, 1914.)

1. CHANCERY JURISDICTION. *Unliquidated damages for breach of contract.*

If the damages claimed in a chancery bill for unliquidated damages for breach of a contract arise out of injuries to property—*e. g.*, real estate—a court of equity is without jurisdiction to grant relief.

2. SAME. *Failure of suit upon all grounds of equitable cognizance, leaving question on unliquidated damages only.*

Although a bill in equity contains many matters of equitable cognizance, yet if all these fail, leaving a common law feature alone, it must be dismissed for lack of jurisdiction.

FROM GREENE COUNTY.

Appealed from the Chancery Court of Greene County.
HAL H. HAYNES, Chancellor.

SHOUN & TRIM for Complainant.

SUSONG & BIDDLE for Defendant.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS bill was filed by the complainant against the defendant to recover damages growing out of the breach of a lease contract entered into between the complainant and the defendant on the 11th day of June, 1907, by which

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the complainant leased to the defendant a certain farm consisting of 240 acres, more or less, and situated in the Eighth Civil District of Greene County, Tennessee, for a period of three years, and at an annual rental of \$360, payable at the beginning of each rental year. The lease contract was in writing.

Under the terms of the lease the defendant was not to plow certain fields on said farm, and was to sow all fields with timothy and clover after wheat and oats. He was also to keep the briars and sprouts cut on the pasture fields; was to break the land deep, and when in proper condition, and was to cultivate the farm in a good husbandlike manner; was not to use any of the green timber for fuel, but was to have all he and his tenants needed for fuel of the down and dead timber.

The bill alleges breaches of the contract as follows:

(1) Failure of the defendant to keep the briars and sprouts cut off of the pasture fields, by reason of which failure, much of the grass on the farm was destroyed.

(2) Breaking the cultivated land shallow, and when not in suitable condition.

(3) Failure to sow, in grass, land cultivated by him in wheat and oats.

(4) Plowing up grass, which had been sown.

(5) Cutting green timber for fuel.

(6) Allowing the fences on the place to get in bad repair, and a general depreciation of the premises.

The bill alleged that, as a result of said breaches of the lease contract on the part of the defendant, his farm had been damaged to the extent of from \$800 to \$1,000.

A rescission of the contract was prayed for, as well as an injunction to inhibit the defendant from further breaches of the contract, and from further waste to the property.

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The defendant answered, admitting the execution of the lease contract, but denied any and all of the specific breaches alleged in the bill.

Upon a hearing the Chancellor held that the defendant had breached his contract, in that he had failed to keep the briers and sprouts cut off of some of the pasture fields; that he had failed to keep the fence rows clear of briers, bushes and other growth; that he had failed to rotate the crops, and break the land deep, as provided by the contract; that by reason of said breaches complainant had sustained damages to the amount of \$250, and a decree was entered accordingly.

The Chancellor did not pass upon the question of the complainant's right to a rescission of the contract, nor the question of his right to an injunction, as the lease contract had expired by its own terms at the date of the hearing.

We might state here that the bill presented no ground for a rescission of the contract. A breach of a contract is not ground for a rescission, unless the contract so provides. The aggrieved party is left to his remedy in damages for the breach.

As to the injunctive relief prayed for, no application was made for an injunction, and no case for injunctive relief was made out by the proof. Therefore, the only question really before the Court below was one sounding in damages for a breach of the contract.

Upon the rendition of the decree in the Court below the defendant filed a petition to rehear, averring that the Court was without jurisdiction to determine the question of damages, for the reason that they grew out of injury to property, and were unliquidated. The petition to rehear was overruled. From the decree rendered against him the defendant has appealed to this Court, and assigns

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errors, the first of which challenges the jurisdiction of the Court below to try and determine the question of damages.

It is admitted by counsel for complainant in their brief that the suit is one for damages, and that the damages are unliquidated, but having arisen out of the breach of contract, the suit falls within the jurisdiction of the Chancery Court as the same was enlarged by the Acts of 1877, chapter 97 (Shannon's Code, section 6109), which extended the jurisdiction of the Chancery Court to all civil causes of action theretofore triable in the Circuit Court with three exceptions. These exceptions were cases involving unliquidated damages when based on (1) injuries to persons; (2) injuries to property; (3) injuries to character.

Our Supreme Court, in the case of *Swift & Company v. Memphis Cold Storage Warehouse Company*, 158 S. W., 481, held that the words, "all civil causes of action," mean only those civil actions which could have originated in the Circuit Court; the purpose of the Act being to give litigants the option of bringing suits in such cases either in the Circuit Court or in the Chancery Court. In other words, the Act made the jurisdiction of the Chancery Court concurrent with that of the Circuit Court in all civil causes of action, except the three expressly named in the Act. Jurisdiction in these remained exclusively in the Circuit Court.

It is insisted by counsel for the complainant that the excepted causes of action mentioned in the Act relate only to unliquidated damages growing out of torts, and not to unliquidated damages growing out of a breach of contract. And that this is true, though the damages may be the result of injury to property.

It is insisted by counsel for the defendant that the exceptions named in the Act embrace all actions for unliquidated damages growing out of injury to property,

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whether the damages be the result of a breach of contract or of tort. In other words, that the only essential elements necessary to bring the action within the second exception of the Act are: (1) That it must be based upon an injury to property; and (2) the damages must be unliquidated. And it is insisted that both of these essential elements exist in the suit at bar.

In *Swift & Company v. Memphis Cold Storage Warehouse Company*, *supra*, which was an action for damages growing out of injury to a large number of cases of eggs stored by Swift & Company with the warehouse company under a contract between the parties, the Supreme Court, in overruling the petition to rehear in that case, said that the fact that the injury arises out of a breach of a contract, does not destroy or minimize the existence of fact that the basis of the suit is an alleged injury to property, and that the damages sought flow from such injury.

We are of opinion that the present action was based upon an injury to property within the meaning of the Act of 1877, and that the damages are unliquidated.

Unliquidated damages are such damages as have not been ascertained or fixed by contract. *Kirkeys & Sons v. Crandall*, 90 Tenn., 532; *Ramsey v. Temple*, 3 Lea, 258.

That the damages sought in the present action are unliquidated cannot be disputed; in fact, this is admitted. We are also of opinion that the action is based on injury to property. The complainant, in his bill, so alleges. After setting forth the breaches and wrongs complained of, the bill alleges: "As a result of the defendant's wrong and his gross and wanton failure to keep and perform his contract with complainant, complainant avers and charges that his farm has now been damaged and decreased in value in a sum not less than from \$800 to \$1,000. Complainant will show in proof the amount and sources of such

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damage done to his said farm by said Russell during the period he has had control and management thereof."

But it is insisted that the bill contained grounds for equitable relief; that is, a rescission of the contract was sought, as well as injunctive relief; and for this reason, the Court also acquired jurisdiction to award damages growing out of the breach of the contract.

Complainant wholly failed to make out a cause for a rescission of the contract. As before stated, a breach of contract does not of itself afford ground for a rescission, but gives to the party aggrieved an action for damages only. Nor was any ground for injunctive relief shown.

Where injunctive and all other equitable relief fails, the Chancery Court has no jurisdiction to award damages for injury to property, if the damages are unliquidated. *Bank & Trust Company v. Hotel Company*, 124 Tenn., 651.

It results that we have reached the conclusion that the Court was without jurisdiction to hear and determine the question of damages, and the decree will be reversed and complainant's suit dismissed with costs.

Brabson v. Tinsley.

WILL AND REPS BRABSON V. S. P. H. TINSLEY.

Writ of certiorari denied by the Supreme Court.

(Knoxville. September Term, 1914.)

1. DURESS. *Plea of, must be sworn to.*

A plea of duress to a suit upon a promissory note is one denying the existence of the contract, and must be sworn to.

2. SAME. *Non est factum. Special or general.*

A general plea of *non est factum* includes all special pleas or grounds of *non est factum*.

3. SAME. *Pleading and practice. Waiver of defencts in plea.*

A plaintiff who joins issue upon a defective plea—*i. e.*, a plea of *non est factum* not supported by an affidavit—waives his right to question the sufficiency or form of such plea.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
V. A. HUFFAKER, Judge.

CHAS. M. ROBERTS for Plaintiff in Error.

G. W. Fox for Defendant in Error.

MR. JUSTICE WILSON delivered the opinion of the Court.

THIS suit was instituted by defendant in error against plaintiffs in error to recover upon a note for \$120, executed February 1, 1913, due in ninety days after date, and payable to defendant in error.

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The note, on its face, was made payable at the Third National Bank of Knoxville. It is signed by plaintiffs in error. It waives demand, notice and protest thereof, and provides that if suit be instituted upon the note, or it be placed in the hands of an attorney for collection, they agree to pay ten per cent attorney's fees and all expenses incurred in its collection, the same to be taxed up in the judgment.

The justice of the peace rendered judgment on the note in favor of defendant in error for the amount thereof and ten per cent attorney's fees, both together, making \$132 and costs. Before the justice of the peace, plaintiffs in error interposed the following plea, not sworn to:

"Comes the defendants, by attorney, and for plea in this case, say that the note sued on in this case was taken under duress and by fraud; that at the time that the said note was executed, the said Tinsley had the said Will Brabson under arrest, charging him with a felony, and held the said Brabson under arrest until he gave the said Tinsley his note, secured by his brother, Will Brabson, and a mortgage on his home before he could secure his release. That the said Tinsley coerced and compelled him, under pain of being sentenced to jail, his signature to the said note for \$120; that he did not owe said Tinsley said amount, and while under fear of being forced to jail, he was forced to sign the said note."

It is signed, Will Brabson, Reps Brabson; Charles M. Roberts, attorney for defendants.

Plaintiffs in error appealed to the Circuit Court, and in that Court defendant in error joined issue on the above plea.

The cause was heard in the Circuit Court February 25, 1914, before a jury. At the conclusion of the evidence of plaintiffs in error, the Court directed the jury to return

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a verdict in favor of the defendant in error, and this was done. The verdict returned was for the amount of the note, with interest thereon, amounting to \$7.68, an attorney's fees amounting to \$12, all aggregating \$139.68. Judgment went against plaintiffs in error also for the costs of the suit. Plaintiffs in error moved for a new trial, which was overruled, and they appealed in error to this Court. The complaint is, in substance, that the Court below erred in holding that plaintiffs in error could not introduce any evidence to the effect that the note was executed under duress and fraud because the plea of duress and fraud was not sworn to. The bill of exceptions shows that upon the trial before the jury, defendant in error read the warrant issued by the justice of the peace and then the note sued upon, and rested. Plaintiffs in error then introduced Will Brabson, one of the defendants below. In his testimony, he stated that he owed defendant in error \$150; that he owed him for a restaurant he bought from him on East Vine street; that he gave him a mortgage on his horse and wagon for his part of the restaurant; that he bought out Aleck Fall's part; that when he bought out Aleck Falls, he paid Mr. Tinsley \$100; that he bought Aleck Falls' part of the restaurant some time before he gave the note sued on. He said that he signed the note. His attorney then asked him whether or not, at the time he signed the note in question, he was under arrest and being sent to jail. He answered, "I was under arrest."

To this question and answer the attorney of defendant in error objected. The attorney of plaintiff in error then asked him whether or not he was still under arrest when he signed the note, and the attorney of defendant in error again objected, and the Court then asked the attorney of plaintiff below whether or not he objected to a part or all of this evidence, and the attorney of defendant in error

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replied, "To all of it," when the Court replied, "I sustain the objection." Then the attorney of plaintiffs in error asked the Court on what grounds he sustained the objection, and the Court replied, "The only way to dispute or attack the validity of the note is either by a special or general plea of *non est factum*, and as defendants' plea is not sworn to, it cannot be used or treated as a plea of *non est factum*."

To this ruling of the Court, the attorney of plaintiffs in error excepted. He was then asked by the Court if he had any more evidence to introduce and the attorney replied that he had not. It was then that the Court instructed the jury to return a verdict in favor of defendant in error for the amount of the note sued on, and ten per cent attorney's fees provided for in the note sued on and the costs of the cause. It is thus seen that the question here raised in the case is as to the correctness of the holding of the Court that plaintiffs in error could not introduce evidence showing that the note sued on was executed under duress and fraud, because the plea of duress and fraud was not sworn to.

This case presents two rather nice points of law.

Our statutes, Acts of 1817, chapter 86; Acts of 1819, chapter 27, and Acts of 1819, chapter 42, as brought into Shannon's Revisal, section 5556, is as follows: "Every written contract, instrument, or signature purporting to be executed by the party sought to be charged, his partner, agent or attorney, and constituting the foundation of an action, is conclusive evidence against such party, unless the execution thereof is denied under oath."

In the case of *A. Johl in error v. Fernberger*, 10 Heis., 37-40, Johl was sued upon a note signed under the firm name of Pollock & Johl. Johl put in a plea of *non est factum*, which was sworn to, averring that the note which

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the action was founded was not executed by him, nor by any one authorized to bind him in the premises.

A demurrer to this plea was sustained, and no further plea being filed, judgment was entered against Johl, and he appealed. The argument of counsel of Fernberger was that the plea of Johl should have been a special plea of *non est factum*, denying the existence of the partnership of Pollock and Johl, as the plea filed might be true, that the note was not executed by Johl nor by any one authorized to bind him in the premises, and yet Johl be bound by the note, upon the ground that it was executed by his partner, Pollock, in the firm name during the existence of the partnership.

Judge McFarland, speaking for the Court, held that this contention was not well taken, because the plea, in legal effect, denied the existence of the partnership at the time the note was executed, or that Pollock was authorized within the scope of the business, to bind the firm by the execution of the note.

The able Judge, in the opinion, said:

"A defendant has the right to plead generally or specially. A general plea of *non est factum* is a general and unlimited denial that the note is the act and deed of the party. A special plea is, in general, an admission of the signing or execution of the paper, but seeking to avoid it by reason of some special matter, such as that it had been altered or changed after its delivery and without the maker's consent, or was delivered as an escrow, etc.

A general plea includes every possible special plea; a special plea of *non est factum* limits the denial to some special matter, or rather, it is an averment of some fact which defeats the operation of the paper as to the defendant, and in such cases the burden of proof is on the defendant."

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He cites 5 Sneed, 179, and 3 Sneed, 459.

In *Stephenson v. Landis*, a suit was brought before a justice of the peace on a note for \$600 bearing ten per cent interest, signed by William Young, and by A. L. Landis and W. H. Young as sureties.

William Young had died and the suit was alone against Landis and W. H. Young. The justice rendered judgment against both defendants for the principal of the note and ten per cent interest, and Landis appealed to the Circuit Court, where the case was tried by the Judge without a jury. No pleas were filed in the case.

On the trial in the Circuit Court, plaintiff read the note in evidence and Landis took the stand as a witness for himself. He proposed to prove, among other things, that the note sued on, although it was dated March 19, 1877, was not signed by him until the first Monday in April, 1877, and was, therefore, usurious, the law permitting a rate of ten per cent interest to be contracted for having been repealed March 20, 1877. This evidence was admitted over objection, and judgment was rendered in favor of Landis. Upon appeal, the Supreme Court reversed the judgment of the lower Court, holding that the admission of the evidence aforesaid of Landis was erroneous.

Judge Cooke, speaking for the Court, after quoting the provision of the Code, that: "All pleas which deny the execution or assignment by the defendant, his agent, attorney, or partner, of any instrument in writing, the foundation of the suit, whether produced, or alleged to be lost, or destroyed, and all pleas since the last continuance, shall be sworn to," says:

"This denial may be made by a general or special plea of *non est factum*. A special plea of *non est factum* admits the actual execution of the instrument, but limits

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the denial to some special matter, or rather, it is an averment of some fact which defeats the operation of the paper as to the defendant."

Citing 10 Heis., 38; 5 Sneed, 179; 3 Sneed, 49; 1 Hum., 28; Meigs Dig., 2175.

In brief, the rule announced in the two cases quoted from, is that, in a suit at law, upon a note or instrument, the foundation of the action, the instrument sued upon must be denied by a general or special plea of *non est factum* sworn to.

The general plea of *non est factum* includes every species of special pleas of *non est factum* and casts the burden of proof upon the plaintiff in the suit. A special plea of *non est factum*, setting out matter or a fact that defeats the operation of the instrument sued on as to defendant, leaves the burden of proof upon the defendant.

Under the rule stated, nothing further appearing, we would have no difficulty in holding that the learned trial Judge was correct in excluding the evidence, the rejection of which is complained of.

But the case presents another nice question, which has given us some difficulty, and which stands in the way of affirming the action of the trial Judge. There was a written plea of fraud and duress interposed by defendants to the suit before the justice of the peace. After the case reached the Circuit Court, plaintiff below took issue on this plea. The question, therefore, arises whether or not plaintiff below did not waive the oath to said written plea.

In the case of *Loeb & Bloom v. Nunn & Vail*, 4 Heiskell, 499, suit was upon an itemized account by plaintiffs, who were non-residents of the State. The account was verified. The defendant pleaded *nil debet* and payment. The suit was before a justice of the peace, and these pleas were not sworn to before the justice, nor otherwise denied

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on oath. The plaintiff below, however, took issue upon the pleas of defendants, and went to trial without taking any exception to the failure of defendants to deny on oath the justice of the account sued on. The Supreme Court held that the plaintiffs, by taking issue on the pleas without an oath, waived the necessity of a plea under oath. Applying this principle to the case in hand, it would seem that plaintiff below having taken issue upon the plea of duress and fraud, interposed by defendant, but not under oath, waived the oath to the plea. If this be true, it would seem that the evidence offered, if sufficient to defeat the action, was admissible, because it appears to be admitted that if the plea had been sworn to the evidence offered would have been competent upon the ground last stated, we feel constrained to hold that the trial Judge was in error in excluding the evidence, and the result is that the judgment of the Court below will be reversed and the cause remanded for a new trial.

Garmany v. Hall.

W. K. GARMANY v. G. A. HALL.

Writ of certiorari denied by the Supreme Court.

(Knoxville. September Term, 1912.)

1. LANDLORD AND TENANT. *Discharge of lessee from liability.*

Any arrangement or agreement between the landlord and a first tenant whereby the landlord agrees to discharge him from the obligations of the lease and to accept another as a substituted lessee and to look to the latter alone, will have the effect of terminating the original lease, although without any direct pecuniary consideration from the original lessee.

2. SAME. *Joint lessees. Promise by one after termination.*

The general rule is that a promise or an act of one joint lessee is binding upon joint lessees. But this is not so with respect to promises or acts of a joint lessee after termination and surrender of the joint lease.

FROM HAMILTON COUNTY.

Appealed from the Chancery Court of Hamilton County. T. M. McCONNELL, Chancellor.

COLEMAN & FRIERSON for Complainant.

PRITCHARD & SIZER for Defendant.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS bill was filed to collect about \$800 alleged to be due from Hall as one of the joint lessees of a storehouse in the city of Chattanooga. The effort is to hold him

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liable upon the ground that his partners and he, as the original lessees of the property, are still bound for rents, notwithstanding two or three sublettings.

The Chancellor dismissed the bill. The case is here by the appeal of the landlord. His principal assignment of error is that the Court erroneously adjudged that there was a release and surrender of the tenancy by the substitution of a new tenant.

Splendid and able briefs dealing with the rules of law governing landlord and tenant have been filed with the record. We are of the opinion, however, that the important and primary question in this case is one of fact. Was there a substitution of one tenant for another, and an acceptance of the new tenant upon the part of the landlord in such a way as to operate in law a surrender of the original lease?

In 1906 the complainant let to the defendant Hall and two associates, H. A. Hall and E. W. Kirby, for a period of five years, a storehouse on Montgomery avenue, in the city of Chattanooga. The lease was in writing and was in every respect formal. The parties desired this building for use as a retail show house. The rental was to be, with the exception of the first few months, at the rate of \$100 per month. This lease contained a provision that it was not to be assigned or the property sublet except by the written consent of the lessor.

Some time after embarkation in the shoe business the lessees desired to discontinue their commercial venture. They negotiated the sale of their business to McDaniel Brothers Company, a corporation. Before consummating the trade, they asked complainant if he was willing to accept McDaniel Brothers Company as tenants. He investigated their financial responsibilities, and informed the original lessees that he found the McDaniel Brothers

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Company reliable, and that he would accept them as tenants. The lease was thereupon assigned in writing to this company in the following words: "We, the undersigned, hereby transfer the within lease with all provisions therein mentioned to McDaniel Brothers Company. This first day of May, 1906." This was signed by Garmany and the lessees. For more than a year after this complainant accepted rent from McDaniel Brothers Company. The preponderance of the proof is that complainant at the time made the declaration that this substitution released the former lessees. About a year and a half after the assignment to McDaniel Brothers Company, they desired to sublet and assign the lease to one Joe Brener. This was assented to by complainant by the following endorsement on the original lease: "I hereby agree and consent for McDaniel Brothers Company to sublease or underlet my two-story building at 238 Montgomery avenue, Chattanooga, Tennessee, for the unexpired term of their lease." Signed by Garmany. Brener was accepted as a tenant and the rents were received from him for several months after this assignment. Brener became bankrupt and discontinued business. McDaniel Brothers Company then made an effort to re-assign the lease to complainant, to secure releasement from any obligation which they had assumed under the arrangement. Complainant refused to accept the reassignment, stating that the obligation of McDaniel Brothers Company was greater than that created by a simple assignment—that there was really an obligation on their part to pay rent. They thereupon assigned this lease to an irresponsible party, and now claim complete discharge therefrom. The Halls likewise insist upon a discharge from liability.

The Halls were employed for some time by McDaniel Brothers Company in the shoe business. Complainant

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saw them there often, but made no demand upon them for rents or for assurances until after McDaniel Brothers Company had attempted to surrender or reassign.

We are of opinion that from these facts, particularly the written assent to the assignment of this lease, that there was an agreement or understanding that McDaniel Brothers Company should be accepted and become the new tenants by way of substitution. This had the effect of working a surrender of the original lease by operation of law.

It is true that a mere assent to an assignment or sublease is not sufficient to operate a surrender. It is likewise true that the acceptance of a new tenant and receipts of rent will not release the former lessees unless there is a relinquishment of all claim against the original lessees and an agreement to accept the new tenant in lieu. The authorities for these propositions are numerous and clear.

But, on the other hand, the acceptance of a new tenant with an agreement, express or implied, to treat him as a substitute for the original lessee, and subsequent treatment of the substituted lessee as onerated with all the provisions of the lease, amounts in law to a surrender of the original lessee without any express agreement to that effect or without additional consideration. *Grommes v. Trust Co.*, 147 Ill., 648; 131 Iowa, 30; 72 Iowa, 324; 24 Cyc., 1370.

The voluntary assumption of any position or relation that is inconsistent with the continuance of the original lease, in other words, such conduct as shows that the landlord has released the original lessee from his obligation, will have the effect of discharging the original lessee. And this is in the main a question of fact. *Barnes v. Trust Co.*, 169 Ill., 118.

It is now urged by complainant that there was an acknowledgment by Kirby of liability under the original

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lease; that this was binding upon his co-lessees, and that they are now estopped to deny liability. The general rule is that co-lessees are bound by any act of one of the lessees during the continuance of the lease. *Barnes v. Trust Co., supra.*

But we are of opinion that it is unnecessary to determine the extent to which Kirby could and did bind Hall. If the acceptance of McDaniel Brothers Company as tenants brought about a surrender of the original lease and a termination of liability thereunder, the subsequent acknowledgment of liability or promise to pay, upon the part of Kirby, would not be binding. This would be something done by a member of the association after the termination of the association and extinguishment of liability. It is beyond the power of a co-lessee to bind former associates.

We feel constrained to hold that the decree of the Chancellor denying relief was correct. It appears to us that complainant will have to look to Kirby and McDaniel Brothers Company for any sums which he may conceive to be due him.

The decree of the lower Court dismissing the bill is affirmed, with costs.

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EDNA M. LOWDER, EXECUTOR, ETC., v. P. H. ANDERSON
AND CORA ANDERSON.

Writ of certiorari denied by the Supreme Court.
(*Jackson*. April Term, 1914.)

1. **WILLS, CONTEST OF.** *Proper practice in instituting.*

When it is desired to have a will certified for contest by the Probate Court of Shelby County or the County Court of another county of the State the proper practice is to make known that desire by petition setting out the interest of the party desiring to contest the facts upon which he desires to set aside the probate in common form when the will has been so probated, or upon which he resists probate in solemn form and desires to contest when it is sought to probate in solemn form.

2. **SAME.** *No jurisdiction in Probate Court or County Court to probate on petition to contest being filed.*

On the filing of such petition the Probate Court and the County Courts are without jurisdiction to probate, their power being then limited to certifying to the Circuit Court the contest and requiring bond of the contestant, etc., preliminary to certifying the will; and a probate in solemn form had thereafter is a nullity, as such courts are without power to pass on the validity of a will on an issue of *devisavit vel non*.

3. **SAME.** *Same. Result not changed because petition not sworn to and bond not in proper amount.*

And the fact that the petition of the party desiring to contest is not sworn to, and that the bond given by such petitioner is not in the amount required by statute does not change the result, as such failures are mere irregularities not going to the jurisdiction to certify the will for contest.

4. **MINUTE ENTRIES NUNC PRO TUNC.** *Proper only when previous order actually made. Not to make one.*

An entry on the minutes *nunc pro tunc* is proper only when the order has in fact been previously made and its entry

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omitted. It cannot be resorted to to *make* an order the making of which was previously omitted.

5. WILL. PROBATE OF. *A nullity, when. Case in judgment.*

L. filed a petition in a probate court asking that a will be probated in solemn form, process issued and interested parties were notified of a date when the probate would be had, before that date one of the interested parties filed a petition asking the will certified to the circuit court for contest. On the day fixed the will was probated. Later, and months after the probate, and after the term of court at which the order of probate was entered, has passed, an order *nunc pro tunc* was made (not simply *entered*) certifying the will for contest as of the date the petition seeking such action was filed. *Held*, That the act of probating after the petition to contest was a nullity, the court then being without jurisdiction to probate the will; that the order *nunc pro tunc* was a nullity, no such previous order having been made; but that, the case still being before the court to certify the will for contest, the order certifying it was valid, though made after the term of court at which the will was probated had passed.

FROM SHELBY COUNTY.

From Probate Court of Shelby County on writ of error.
J. S. GALLOWAY, Judge.

T. K. RIDDICK and D. M. SCALES for Plaintiff in Error.

MURRAY & GILLESPIE for Defendants in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

THIS case comes from the Probate Court of Shelby County by writ of error sued out by Eda M. Lowder, executrix of the estate of Walter S. Lowder, deceased, and

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this Court is asked to reverse an order of the Probate Court of Shelby County certifying to the Circuit Court of that county, for contest, the will of Walter S. Lowder, deceased.

On October 11, 1912, Eda M. Lowder filed in the Probate Court of Shelby County her petition asking that a paper writing purporting to be the last will and testament of Walter S. Lowder, deceased, be probated in solemn form. She sought and obtained process against the next of kin and devisees under the will, asking that they be each required "to appear on a day certain according to the rules" of the Probate Court and become parties to her proceeding or show cause why the will "shall not be admitted to probate in solemn form, or take such steps as they may see proper to contest the same." The process or summons was duly served on all of the parties named in the petition as heirs at law and devisees of the deceased, notifying them to appear before the Probate Court on the first Monday of November, 1912, "then and there to answer the petition of Eda M. Lowder for the probate of the will of Walter S. Lowder, deceased, in solemn form." The return of the officer on the process thus issued showed service on the parties named therein, including P. H. Anderson and wife, Cora Lowder-Anderson. After this process was served, and on October 25, 1912, P. H. Anderson and Cora Lowder-Anderson filed their petition in the Probate Court, alleging the death of Walter S. Lowder without issue, and that Mrs. Anderson was his sister and heir at law, and the fact that it was claimed that he had left a last will and testament and making the further allegation that the paper writing claimed to be such was not the last will and testament of the deceased, and praying that they might be allowed to contest the said paper writing, and to that end that the "cause be certified up from

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this (the Probate) Court to the proper forum, where an issue may be made whether said paper writing is the last will and testament of the said Walter S. Lowder, deceased, or not." This petition was duly sworn to. Process was issued directing that Eda M. Lowder, the sole defendant named in the petition, be summoned before the Probate Court on the first Monday in November "to answer the contest," and it was duly served. So it is seen that the parties named as defendants in the petition to probate the will in solemn form and the one defendant in the petition to have it certified to the Circuit Court for contest were notified to appear before the Probate Court on the same day. On the day named, which was the 6th of November, 1912, it appears from the minutes of the Probate Court that the matter of probating the will came on for hearing on the petition which had previously been filed for that purpose, the hearing being on the motion of the proponent, and on the testimony of the two subscribing witnesses to the will, as a result of which hearing the instrument was adjudged to be the last will and testament of deceased, and ordered of record as such.

No further steps were taken in the case until June 11, 1913, or more than seven months after the entry of the order admitting the will to probate, but under the last-named date it appears that P. H. Anderson and wife, Cora Lowder-Anderson, were granted permission to amend their petition for contest of the will which had been filed on October 25, 1912. Among the matters added to the petition by way of amendment were allegations of specific reasons why the paper writing in question was not the last will and testament of deceased. Among the specifications of reasons it was set out that Walter S. Lowder, deceased, at the time of the execution of the will, was not of sound mind, and that he had been induced to execute

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the same through fraud, coercion and duress on the part of his widow, Eda M. Lowder, the one named as chief beneficiary therein. By an entry on the minutes of the Court on the same day, June 11, 1913, it is recited that P. H. Anderson and wife had presented and filed their petition on October 25, 1912, seeking to contest the alleged will, and that the will had been probated in solemn form as to certain beneficiaries named in it, but that P. H. Anderson and wife had not been served with notice of the probate in solemn form, and that therefore the previous order was not binding as to them, and it was ordered that the will be certified to the Circuit Court for probate. In this order it is recited that "such fact of contest should have been ordered certified as aforesaid on said October 25, 1912. It is therefore ordered, adjudged and decreed by the Court that this order and decree be entered *nunc pro tunc*, as of that date," and it is further recited that on the application of Anderson and wife they were permitted to change the penalty of the bond previously given from \$250 to \$500; and the \$500 bond was accordingly filed.

It is insisted before this Court that the Probate Judge committed error in the entry of the judgment of June 11, 1913, for the following reasons: (1) That it was the setting aside of the probate of a will in solemn form on the ground that P. H. Anderson and wife had not been served with notice to probate in solemn form; whereas, the record in the case showed that they had been served, and there was no averment in their petition to contest to the contrary; (2) that the final decree or judgment of the Court entered in November, 1912, not being appealed from, was final and the Court had no jurisdiction to grant the petition to contest and certify the will accordingly at the subsequent June term—that with the passing of the November term the Court had lost jurisdiction of the case

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and of the parties; (3) that because the amended petition was not sworn to and because an insufficient bond had been given originally it was improper to grant the relief asked; and (4) that it was improper to enter a *nunc pro tunc* order because in fact no such previous order had ever been made. Such are, in effect, the assignments of error, though we have not stated them in the language of counsel.

The most serious contention is the question of jurisdiction; that is, whether the entry of the order showing the probate of the will in solemn form in November, 1912, was such a final adjudication of the matters involved as that at no term thereafter did the Court have jurisdiction to certify the will for contest. We think, however, that our statutes control this matter.

Shannon's Code, section 3905, provides as follows:

"Where the validity of any last will or testament, written or nuncupative, is contested, the County Court shall cause the fact to be certified to the Circuit Court, and send to said Court the original will, and shall require the contestant to enter into bond, with surety, in the penal sum of five hundred dollars, payable to the executor mentioned in the will, conditioned for the faithful prosecution of the suit, and in case of failure therein, to pay all costs that may accrue thereon."

This statutory provision, it is seen, applies by its express provisions to County Courts, but in the matter of probate of wills the Probate Court of Shelby County has the same jurisdiction that the County Courts of other counties of the State have (Shannon's Code, section 387); and it is not claimed by any one that it has any greater jurisdiction, or that the practice before it in such matters is in any sense different from that in County Courts of other counties of the State. Treating the section of the Code just set out as applicable to the case in hand, it is observed

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that, "Where the validity of *any* last will or testament, written or nuncupative, is contested, the County Court *shall* cause the fact to be certified to the Circuit Court," etc., which provision, we think is necessarily conclusive of his case. See Pritchard on Wills and Administration, section 349, expressing the same view as to the effect of the statute referred to.

That the County Courts of the State and the Probate Court of Shelby County have no jurisdiction to pass on the validity of a will on an issue of *devisavit vel non* is too well settled to require any extended consideration or citation of authorities, but we refer to Pritchard, section 337, and cases there cited; and that the proper method of making known to the County Courts of the State, and to the Probate Court of Shelby County that the "validity of any last will and testament . . . is contested" is by petition, is equally well settled, as we will show by authorities to be cited later herein. Then, under the express provisions of the statute, what had the Probate Court of Shelby County to do when the petition to contest was filed except certify the will to that tribunal where the issue of will or no will is properly triable? It is true the Probate Court could have refused to certify the will for contest, but on such refusal the remedy would have been an appeal, as is held in *Keith v. Raglan*, 1 Cold., 475.

As to the assignments of error based on the alleged insufficiency of the petition and failure to give the proper bond, we think this case of *Keith v. Raglan*, *supra*, also very much in point. In that case, after a will had been certified for probate, motion was made in the Circuit Court to "dismiss this cause and strike it from the docket," because, among other things, "the petition before the County Court to contest the same was not sworn to"; and there was also made a motion "to quash and dismiss said pro-

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ceedings, because there was no ground shown in said petition to contest said will, and because the contestants did not give bond as required by law in the County Court, or offer to do so." On this motion to quash being made, bond was given in the Circuit Court. It was held by our Supreme Court that these motions, the motion to dismiss and strike from the docket and the motion to quash, should have been made in the County Court, and that they came too late in the Circuit Court, and that the will had, therefore, been properly certified for issue and trial in the Circuit Court. This holding demonstrates that the matter of setting out grounds of contest in the petition, and the matter of giving bond are matters of mere irregularity and not matters going to the jurisdiction of the County Court, for, if they had been matters going to the jurisdiction of the County Court, it could not have been held that the will was properly certified for probate and that the motions in the Circuit Court came too late.

The case of *Miller v. Miller*, 5 Heis., 723, is in accord with this view. In that case, following the holding in *Cornwell v. Cornwell*, 11 Hump., 485, it was held that the proper practice, when it is desired to have a will certified to the Circuit Court for contest, is to make known that desire by petition setting out the "interest of the plaintiff, and the facts upon which he relies to set aside the probate" (in common form, of course), "and repropound the will; the executor, being summoned, should make his defense by answer to the petition." And, further on, it is said, "As a matter of course, if the petition does not show the right of a party on its face, it would be open to demurrer," but that "defenses to the petition, other than a demurrer, must be presented by way of an answer to the same." Where the will is offered in the Probate Court or County Court for probate in solemn form of

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course the petition to contest should seek a transfer to the Circuit Court in advance of such probate as was done in the case at bar.

There was no demurrer to the petition filed by the Andersons, or any other defense as to that matter, and no effort to take advantage of the fact that the penalty of the bond was not in the amount required by statute, so that it stood without defense, and the omissions complained of, not going to the jurisdiction of the Court, the only thing left for the Court was to certify the will for contest, even if there had been no amendment—certainly with the amendment and a proper bond.

It is true a County Court of the State or the Probate Court of Shelby County is not under obligations under any and all circumstances to certify a will for contest on the mere filing of a petition asking therefor, as the preliminary question of the right of the proposed contestant or contestants to make the contest may arise, and if it does, it is a proper matter to be settled in the County Court or Probate Court before the will is certified for contest, as is settled by many adjudications, the latest of which is that of *Shaller v. Garrett*, 19 Cates, 665. But in the case at bar where there was no question raised as to the right of petitioners P. H. Anderson and wife to contest, and therefore no question of preliminary investigation before the Probate Court. Its duty and sole duty therefore was to certify the will for contest. We think it clear it had no power after the petition to contest was filed to probate the will in solemn form. The probate in solemn form is itself a settling of all questions that could be made on contest in the Circuit Court, and if the Probate Court, after the petition to contest has been filed, can go on and hear the issue of will or no will and probate the will in solemn form it can thereby defeat the contest in the Cir-

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cuit Court. Such is not within the power of the Probate Court.

As to the assignment based on the purported *nunc pro tunc* entry, we think the contention well made that no entry *nunc pro tunc* can be made when no previous order has been made and omitted, and that therefore the use of the term *nunc pro tunc* in the order of the Probate Court certifying the will for contest is simply a misuse of the term. The Court recites that the fact of contest should have been ordered certified at the November term, and that it "is therefore ordered, adjudged and decreed by the Court that this order and decree" (the one entered at the June term), "be entered *nunc pro tunc*, as of that date." This was clearly the *making* of an order *nunc pro tunc*, not the entering of one, and therefore unauthorized.

In 18 Encyc. of Pleading and Practice, 458, note, is found the following as to the distinction between the *making* of an order *nunc pro tunc* and the *entering* of one: "Under the general title of entry of judgment *nunc pro tunc* are usually embraced all cases of omissions to render a judgment at the proper time and omissions actually to enter such a judgment when properly rendered. This use of the term would seem to be misleading, since the two classes of cases embraced under it are entirely distinct. In the first class are found those in which, though ripe for final judgment, as for instance after a verdict returned, the judicial function of actually rendering the judgment has not been performed. In the second class are found those cases where the judgment, though actually rendered at the proper time by the Court, has for some reason not been entered by the clerk."

And at page 465 of the same volume, with reference to the *entry* of such an order, it is said: "In order that a judgment be entered *nunc pro tunc*, it is absolutely essen-

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tial that a judgment shall have been previously rendered by the Court."

The same distinction and principles are found in 23 Cyc., 835, 836, and 842, 843, when considered together. At pages 835, 836, it is said: "The rendition of a judgment is the judicial act of the Court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict. The entry of a judgment is a ministerial act which consists in spreading it upon the record or writing it at large in a docket or other official book." And at pages 842, 843 this is found: "In any case where a judgment was actually rendered, order made, or decree signed, but the same has not been entered on the record, in consequence of any accident or mistake, or the neglect or omission of the clerk, the Court has power to order that the judgment be entered up *nunc pro tunc*, the fact of its rendition being satisfactorily established and no intervening rights being prejudiced. . . . The power to order the entry of judgments *nunc pro tunc* cannot be used for the purpose of correcting errors or omissions of the Court. This procedure cannot be employed to enter a judgment where the Court wholly failed to render any judgment at the proper time."


Consonant with these distinctions and principles are our own cases of *Davis v. Jones*, 3 Head, 603, and *McGavock v. Puryear*, 6 Cold, 38, and *Swan v. Harrison*, 2 Cold., 534.

But the order was made at the June term was a proper order made at that term, and the addition of the *nunc pro tunc* feature may well be regarded as surplusage. It was certainly useless and of no effect. The order showing the will probated in solemn form being made after the Court had lost jurisdiction to make it, as just herein set out, the case stood just as if no such order had been made, and

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the proposed contestants had a right at the June term to have their petition acted on. And on this view of the case, there can be no question but that petitioners had a right to amend their petition and had a right to give the proper bond at the June term.

We do not base our action in this case on the theory advanced by counsel for P. H. Anderson and wife that the County Court could at a subsequent term ignore a valid order probating the will in solemn form at the November term. If the probate in solemn form at the November term had been valid we are of opinion that the Court would have been without power to certify the will for contest at the subsequent term. As stated by our Supreme Court in *State v. Lancaster*, 11 Cates, 638, 651, "When it (a will) has been probated in solemn form, no question of validity or invalidity can be thereafter raised, except upon a bill filed to set aside the judgment for fraud in its procurement, as any other judgment may be set aside"; and that different terms of the County Courts of the State and the Probate Court of Shelby County are as distinct and separate as the different terms of the Circuit Courts or the Chancery Courts of the State, so that a final valid order made in a case at one term of a County Court or the Probate Court of Shelby County cannot be changed at a subsequent term, is recognized in many of our cases. *Keith v. Raglan*, 1 Cold., 475; *Roberts v. Stewart*, 2 Swan, 162; *Roberts v. McMillin*, 9 Lea, 573, are among such cases, and many more might be cited. The point of our holding is that on the filing of the petition to contest, no question being made as to the right of the parties to have the will certified for contest, the Probate Court was without jurisdiction to entertain the matter of probating the will in solemn form, and its effort to do so was a nullity; and the petition remaining undisposed of until the next June term



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of the Court, was a pending litigation just as if no order showing the will probated in solemn form had been entered, and that therefore at the June term of Court the order certifying the will for probate was properly made. It need scarcely be said that the reasons given by the lower Court for its decision is not at all material. This Court will affirm its action if found correct though based on an insufficient or unfounded reason (*Hughes v. Marquette*, 1 Pickle, 127; *Chambers v. Chambers*, 8 Pickle, 707; *Shaefer v. Mitchell*, 1 Cates, 193; *Halfacre v. State*, 4 Cates, 609); so that, notwithstanding the Probate Court based its action, in certifying the will for probate at the June term, 1913, of the Court, on the erroneous assumption that the Andersons were not before that Court at its November term, 1912, the action was correct for the reason herein set out; and it is therefore affirmed at the cost of the executrix. The case is remanded to the Probate Court that its order certifying the will for probate may be carried into effect.

MASSACHUSETTS BONDING COMPANY v. D. M. McLEMORE
ET AL (2 cases).

Affirmed by the Supreme Court.
(*Jackson*. April Term, 1914.)

1. **PLEADING AND PRACTICE.** *Judgment on replevin bond in attachment suits. Should allow return of property.*

The judgment for plaintiff in an attachment suit upon the defendant's replevy bond given for the property attached should provide for its satisfaction by return of the property attached, unless it be manifest from the wording of the bond that the intention was to substitute personal liability of the sureties.

2. **SAME.** *Proper judgment as to return of property.*

The judgment should allow return of property in as good condition as when replevied, less ordinary depreciation. Failing to so return, defendant below and his sureties are then liable for the *value* of the property at the time of replevy.

3. **SAME.** *Judgment, void or voidable.*

But a judgment which does not allow return of the property is irregular and voidable only and not void.

4. **ERRORS.** *Waiver of, by suing out injunction. Void and voidable judgments.*

The suing out of an injunction is a waiver of mere irregularities and errors committed during a trial at law, and estops the party to assign these errors afterwards in an appellate court. But this does not result if the judgment sought to be enjoined is utterly void.

5. **PLEADING AND PRACTICE.** *Plea in appellate court of release of errors.*

An appellee may by plea in the appellate court aver that appellant waived and released his right to assign errors to the action of the lower court by suing out an injunction.

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6. **PRINCIPAL AND SURETY.** *Result where principal not estopped, although surety is.*

Although a surety in a replevin bond against whom judgment is rendered estops himself to assign errors by suing out an injunction, whatever relief or modification his principal may obtain whereby the liability on the replevin bond is reduced inures to his benefit. The obligation of the surety is not greater than that of his principal.

7. **REPLEVIN BOND.** *Discharge of liability by tender. To whom made.*

A tender of the property replevied from an attachment levied by the sheriff must be made to the sheriff. Tender to the party is not effectual.

8. **NEW TRIAL.** *Errors of law.*

No motion for a new trial is necessary to obtain a review of errors of law evidenced by the technical record.

9. **PRACTICE.** *Decree or judgment of this court molded to suit facts and situation.*

When both a law case and an equity case relating to the same subject-matter are heard in this court at the same time, the judgment and decree will be entered here with reference to each other, and will be molded to suit and to correlate the two cases.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County. Division No. 1. J. P. YOUNG, Judge.

R. P. CARY for Bonding Company and Cook.

McKELLAR & KYSER for McLemore.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

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THESE two causes, although coming from different Courts, relate to the same subject-matter and were heard together. One opinion will suffice for the two.

The first of the cases is the later in point of time, but the matters involved in the one first brought can be more easily determined after disposing of the questions arising upon the later one. We shall, therefore, first take up the equity cause.

The object of the bill, which was filed in April, 1912, was to enjoin the collection of a judgment recovered by McLemore at the January, 1912, term of the Shelby Circuit Court. It was averred in substance that the judgment had been obtained in this wise: In January, 1911, McLemore began his suit in the Circuit Court against J. B. Cook to recover damages for personal injuries alleged to have been sustained in a collision with an automobile operated by Cook. The attachment authorized by the Automobile Act of 1905 was sued out by McLemore and was levied upon the machine. It was taken in charge by the officer and placed in the custody of a garage keeper in Memphis as the agent of the sheriff. In a short while after the machine was thus attached, some parties interested with Cook in the machine, or in some way concerned about it, induced him to replevy the machine as authorized by the statutes regulating attachments. The complainant became the surety on this bond. Its provisions, after reciting the steps that had been taken in the cause up to that time, were in substance that the bond was executed to replevy the machine, valued at \$400. The bond contained the following condition: "Now, should the said defendant pay the debt, interest and costs of the suit, in case he be cast in said suit, then the above obligation to be null and void. Otherwise to remain in full force and effect." At the appearance term judgment by

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default was taken, Cook for some reason having determined not to litigate. At the January, 1912, term, the writ of inquiry which was awarded pursuant to the default judgment was executed by the return of a verdict fixing McLemore's damages at \$700, and sustaining the grounds of attachment laid. The Court thereupon rendered judgment against Cook for \$700 and costs of suit, and rendered a further judgment against complainant and Cook for the sum of \$400, recited to be the value of the automobile replevied. Execution was awarded. Complainant avers that it had no knowledge of the rendition of this latter judgment until a brief period before the filing of the bill, and further averred that when informed of its rendition it concluded that it was in accordance with the statute which allowed it to satisfy its obligation by returning the machine. Learning otherwise, it brought this bill for the purpose of enjoining the collection of said judgment upon the theory, we must presume from the argument of learned counsel, that the judgment was absolutely void. It was alleged that the automobile was in custody of Cook, and a tender of the same was attempted to be made with the bill. It is appropriate here to say that by an amended bill a formal tender to Cook was alleged, with the further averment that he had declined to accept the same. There necessarily arose and arises the contention that by this tender the judgment was satisfied as to the surety.

To the original and amended bills a demurrer containing numerous grounds was interposed. The Chancellor overruled the same and required answer. Considerable proof was subsequently taken. At final hearing the Chancellor dismissed the bill upon the grounds set forth in the demurrer. From this decree complainant prosecutes this appeal.

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The theory of complainant that the omission from the judgment of the right to return the property renders it void is not sound. The judgment is not void, notwithstanding errors and irregularities in its rendition. The Court had jurisdiction of the subject matter and of the parties, and therefore had the right to render a judgment declarative of the rights of the parties arising from the scope of the pleadings. Hence, the judgment, however erroneous, cannot be pronounced void. See 2 Head, 570; *Barrie v. Frayser*, 10 Heiskell, 211; *Upton v. Phillips*, 11 Heiskell, 226; *Ward v. Kent*, 6 Lea, 132. We pretermit for the present a discussion of the question as to whether or not the judgment was erroneous by reason of the failure to allow a return of the property attached. There is quite a difference with respect to the rights of complainant as surety upon a replevy bond when the judgment against the surety is merely irregular instead of being void. It has been held in numerous cases that to a void judgment the surety is a stranger insofar as he makes an effort by original bill to assail the judgment. *Barrie v. Frayser*, *supra*.

But the most serious contention urged against complainant is to the effect that by the filing of this bill and the suing out of an injunction it waived all errors and irregularities committed in the proceeding at law. This question raises an interesting and somewhat novel point of practice. It is apparent that the only grounds available for attacking the judgment at law are those of mere irregularity, and not those rendering the judgment absolutely void. Hence, there is force in the contention urged that complainant is estopped to complain of those errors and irregularities. But this is a matter which will arise more properly in our discussion of the law case. The present bill cannot be maintained upon the theory that the judg-

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ment is void, and this virtually disposes of the suit in equity adversely to complainant.

While not pressed upon us, an insistence is that the surety was entirely relieved by the formal tender of the automobile to McLemore. This contention must also be resolved against complainant. In the first place, if it be conceded that it had the right to return the machine, there was great delay in the effort to avail itself of this right. In the next place, the correct way to restore property replevied in attachment proceedings is to tender it to the sheriff at the time restitution should be made. A tender to the plaintiff in attachment is neither authorized nor allowable; and for this reason we are of opinion that the supposed tender must be held ineffectual for any legal or equitable purpose. *Smithson Civil Procedure*, 1413.

Learned counsel for McLemore is nearly correct in his statement that a surety must in a great measure abide the consequences of any missteps upon the part of his principal. But his contention that the judgment was proper, although not allowing a return of the property, is not sound, as will be seen later on. At the same time, however, we repeat that this was an irregularity only, and not an omission rendering the judgment void.

Passing to the law case: The record is filed by both Cook and the bonding company for writ of error. The error assigned was the failure of the lower Court to allow a return of the property attached.

The surety is met at the threshold with a plea of estoppel to the writ of error. This plea is, in substance, that prior to the filing of the record, the bonding company filed a bill to enjoin the collection of the judgment at law upon the ground that it was void or irregular; and it was asserted that the suing out of this injunction was a release of its right to assign errors committed in the former case.

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A motion to strike this plea was made by learned counsel for the company, predicated upon the contention that it is an unknown and unallowable procedure for a Court of review to entertain *any* plea.

We are of opinion that the plea is properly filed, and shall briefly state our reasons for so holding. While a writ of error is in most respects the continuation of an old case, it also partakes of the nature of a new suit, in that it is a proceeding begun with notice issuing out of the reviewing Court. The party against whom it is sought must not be deprived of the right to show that the petitioner is not entitled to the writ by reason of waiver or estoppel. If this construction be given our procedure, then the Act of 1801, chapter 6, to the effect that the suing out of an injunction is a release of errors at law, would have no efficacy whatever. For the fact that an injunction has been sued out and that this creates an estoppel can be brought to the attention of the Court only by some document which may properly be characterized as a plea to the writ of error. This practice is countenanced by the case of *Henley v. Robertson*, 4 Yer., 172, and also by the case of *Patterson v. Gordon*, 3 Tenn. Chy., 18. We therefore overrule the motion to strike.

Passing now to the matter of this plea, it is said by learned counsel for plaintiffs in error that the filing of the injunction bill did not have the effect of depriving it of the right to attack the judgment upon the ground that it is void. This is an entirely sound proposition: but we have held that the judgment assailed is not void. If we are right in our holding that the grounds of complaint inuring to the bonding company were and are mere irregularities of procedure, then the suing out of the injunction must be treated as a waiver of its right to assign errors. This is the necessary result. It is simply an

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election by a party to present his grounds of complaint to a Court of Equity and upon equitable grounds, instead of relying upon the right to complain by writ of error or appeal. Insofar as the bonding company is concerned, we feel constrained to hold that it can obtain no relief.

At the same time with reference to Cook, we are forced to take a different view. It is urged that in reality Cook joined with the bonding company in suing out the injunction. This does not appear to us to be the case. What the consequences will be if we modify the judgment as to Cook is a matter of no concern to us now.

That the judgment in question is not in proper form must be admitted. It should have given Cook and the surety the right to return the machine in satisfaction of the replevy bond. It is urged that Cook cannot make this contention. We are of opinion that he can do so, as good faith between his surety and himself demands that he see that proper judgment be rendered, and this consideration gives him the right to avail himself of appellate procedure for the purpose of having the proper judgment entered.

It will be noted that this bond is in double the value of the property attached. It is also manifest that bond was given pursuant to the statutes allowing the replevy of property attached. It is true there is no provision in the bond allowing the return of the property, but we are of opinion that this condition is written into the bond by virtue of sections 5269 and 5295 of Shannon's Code, and that the Court should, as a matter of law, have so inserted it in his judgment. *Richards v. Craig*, 8 Baxter, 457. It can be forcibly urged that this right belonged to the defendant and his surety notwithstanding its omission from the judgment. But we think this of sufficient doubt to justify the filing of the record by Cook for a correction: *Ward v. Kent*, *supra*; *Smithson's Procedure*, 1413.

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The result of the foregoing is that the decree of the Chancellor dismissing complainant's bill in the equity cause is affirmed with costs. The judgment of the lower Court insofar as Cook is concerned is modified so as to provide for a return of the property in as good condition as it was at the time of its replevy (*Kuhn v. Spellacy*, 3 Lea, 283), or to pay its value. As to the bonding company, the application for a writ of error will be denied. One-half the costs of the proceeding in error will be paid by the bonding company and the other half by McLemore. It may be that the parties have lost their right to have a reference to ascertain the value of the property to be other than that fixed by the clerk, but that is a matter which is not now before us for determination. But see *Ward v. Kent*, *supra*.

We attach no importance to the contention of learned counsel for McLemore that the matters assailed here were not raised by motion for a new trial in the Court below. That is never necessary when the matters complained of are errors of law apparent from the record, as is the case here. We pause to remark that the Courts have gone to seed as it were with reference to the requirements, form, and particularity of motions for new trials. In some jurisdictions there is an effort made to dispense with such motions altogether and to substitute a *broad* appeal.

ON PETITION TO REHEAR.

ON a former day of the term an opinion was prepared and filed disposing, as we thought, of the issues then before us. A petition to rehear has been filed, and after mature consideration thereof we feel constrained to grant it and to modify our holdings to this extent:

The right will be reserved to Cook to tender back the automobile to the sheriff according to the conditions of

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his bond and according to the statute, provided the automobile is reasonably intact and capable of identification. If the machine is not in as good condition, depreciation by mere lapse of time excepted, the plaintiff will be entitled to indemnity from Cook and his bondsmen for the depreciation. We are of opinion that it will not be wise to let this question of depreciation be determined either by the sheriff or by the plaintiff below. The better practice is to allow a return with the right to demand that any depreciation in value be made good by principal and surety. We are unable to conceive of any other course to be pursued. We repeat, however, that the plaintiff below is entitled to the automobile in substantially as good condition as it was when replevied. Our holding now simply is that if an issue upon this matter be raised it cannot be determined extra-judicially without consent.

With respect to the decree in the Chancery case, we direct that no execution issue for the amount thereof, but that execution shall issue for costs only for the present. We are constrained to hold that a satisfaction of the judgment below insofar as the principal is concerned is a satisfaction *pro tanto* of the liability of the surety. It would be inconceivable to allow the principal for whose liability the surety bond is bound to relieve himself of an obligation and yet hold the surety responsible. But it must be inserted in the judgment and decree of this Court that the bonding company remains obligated to indemnify the plaintiff below for all damages which he may or shall sustain by reason of the wrongful suing out of the injunction, and also by reason of any failure upon the part of the principal to comply with the judgment respecting the automobile. If it subsequently develops that the plaintiff has sustained injury in that the machine is not substantially in as good condition as when attached, or if by the

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suing out of the injunction, injury otherwise is shown to have been sustained by plaintiff, the liability of the bonding company to this extent must and will remain unaffected. But for the present we think it within our power and competency to deny the issuance of execution for the money recovery sought against the bonding company.

ON SECOND APPEAL.

THE events and proceedings leading up to the questions now presented to us may be epitomized as follows:

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Upon remandment to the lower Court the machine was sold. The net amount realized thereon was \$152.26. This was credited upon the judgment of \$400 against the bonding company, and thereupon the Court awarded without further ceremony an execution against the bonding company for the remainder of this \$400 judgment. No effort was made to show by proof the condition of the machine or that it had been damaged while in Cook's possession, or that McLemore had been damaged by the wrongful suing out of the injunction.

The bonding company excepted to that part of the judgment of the Court awarding execution for the balance of the \$400 judgment, and is here assigning errors.

That the judgment of the lower Court is at variance with the judgment and orders of this Court is manifest. That the company has the right to insist that the plaintiff below be confined to such damages as he could show were suffered by him in consequence of the wrongful suing out of the injunction is equally clear. This Court emphatically announced that the surety could avail itself of the benefits that would result from the delivering up of the automobile; but this last feature the trial Judge en-

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tirely ignores. We regret that we cannot terminate this unfortunate litigation. But there is no other way for us to do than to remand the causes with directions to proceed to formulate the issues as to the amount of damages suffered by plaintiff below by reason of the wrongful suing out of the injunction, those damages being depreciation in the condition of the machine such as can be attributed to the wrongs or negligent acts of Cook, and such other damages as can be shown did result from the wrongful detention of the machine.

We deem it unnecessary to cite cases or to discuss any further the questions presented. McLemore cannot escape the effect of the holdings of this Court upon the law and equity cases at the last term, and this prevents him from standing upon the strict law of either case. These cases are inextricably united, and a separation thereof would work a violation of the rules of law of equity. It is McLemore's misfortune that Cook is not solvent. This fact alone does not justify him in insisting that the bonding company shall be liable over and beyond the obligations which the law fixes upon sureties in legal proceedings. The bonding company cannot be considered as a mere interloper. Notwithstanding its assumption of obligations, it has a right to avail itself of all the rights and privileges which the law allows and adjudges to its principal.

We find upon reading the opinion of the Supreme Court upon certiorari in these cases that our conclusions and directions met its approval.

The judgment of the lower Court is reversed, and the cases remanded to be proceeded with in accordance with the views expressed in the previous opinions of this Court, especially the opinion on rehearing at the last term, and the opinion in the present case. Defendant in error will pay the costs of this Court.

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This case is a forcible reminder that our legal machinery is cumbersome and that it needs simplification. There should be means provided for settling or correcting errors in common law trials by petition or writs suitable for that purpose instead of resorting to an independent equitable proceeding. At the same time, much depends upon the Judges and the attorneys in all trial Courts especially, and much can be done towards simplification without resort to legislation.

S. S. CRUMLEY ET AL. V. THE REICON CO. ET AL.

Writ of certiorari denied by the Supreme Court.

(*Knoxville*. September Term, 1913.)

1. BUILDING CONTRACT. *Release of surety on bond guaranteeing faithful performance of, by additions to the building.*

R. entered into a contract with C. to provide all the material and perform in good workmanlike manner certain work to be done on a building, including an addition to it, the work to be done being shown by plans and specifications, and it was provided that the owners contracting to have this work done might make additions to the work on the written order of the architect without impairing the contract, but that no extra work should be paid for unless a written order was given for it signed by the architect. T. became the surety on a bond guaranteeing the faithful performance of this contract. After the bond was given, without the assent of the surety a story was added to the building not known by the surety to be in the contemplation of the parties at the time it was given, increasing the cost from \$8,300.00 to \$10,364.037, or nearly twenty-five per centum. *Held*, That such material change was not in contemplation of the parties and released the surety on the bond.

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2. *SAME. Same.*

And the fact that the amount added to the original contract price did not exceed the penalty of the bond does not change the result, as the increase in size of contract increased the risk.

3. *SAME. Same. Local agent has no power to bind principal by representations beyond scope of authority.*

And the fact that local agents of the surety guaranteeing the performance of the contract represented that no additional bond was necessary to cover the additional story as the original bond was sufficient, will not change the result, as such representation was beyond the scope of their authority, where the circumstances charge the parties having the work done with their lack of authority.

4. *FURNISHER'S LIEN. Attachment to enforce.*

A description in a bill to enforce a furnisher's lien of the property on which the lien rests supplies the place of a description in the attachment issued thereon.

5. *SAME. What will excuse attaching or levying execution to enforce.*

Where a furnisher, having a claim which he may enforce by attachment or execution and levy, brings suit to enforce his lien by execution and is enjoined by the owner of the property from further prosecuting his suit and thus prevented from enforcing his lien till the time within which he could have done so has expired, he will not be deprived of his lien.

6. *SAME. Action to enforce must show brought in time.*

An action to enforce a furnisher's lien must affirmatively show it was brought within the time allowed by law, otherwise no lien will be declared.

FROM WASHINGTON COUNTY.

Appeal from the Chancery Court of Washington County. HAL H. HAYNES, Chancellor.

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HARR & BURROW, REEVES & CRUMLEY and LEROY REEVES for Complainants.

A. Y. BURROWS, COX & SELLS, A. R. JOHNSON and E. J. VAUGHT for Defendants.

MR. JUSTICE HUGHES delivered the opinion of the Court.

COMPLAINANTS, S. S. Crumley and F. B. St. John, entered into a contract with The Reicon Co., a corporation, for the erection and completion of an addition to an old church building in the city of Johnson City, Tennessee, and the doing of other work thereon, under the direction and to the satisfaction of an architect, so as to convert the building into one to be used for a hotel. The Reicon Co. obligated itself to furnish the materials and perform the work set out in drawings and specifications furnished by the architect, at an agreed and fixed price of \$8,300, subject to additions and deductions to be presently more fully noted. The Reicon Co. entered into bond with The Title Guaranty & Surety Co., a corporation, as its surety thereon, in the sum of \$3,000, conditioned that The Reicon Co. should faithfully perform its contracts, and well and truly indemnify and save harmless the said S. S. Crumley and F. B. St. John "from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions" thereof. The bond provided also that in case of default on the part of The Reicon Co. in carrying out its part of the contract The Title Guaranty & Surety Co. should have the right to "assume and complete, or procure the completion" of the contract. It was provided by the contract that the work on the house should begin not later than February 25, 1909, and be completed not later than ninety days thereafter. The

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work on the house was completed on July 6, 1909, or more than ninety days after the work began, and it is disclosed that The Reicon Co. failed to comply with the contract in the matter of paying for much of the material which went into the building. As a result of these failures various parties who furnished materials gave notices to the owners of the building, and took other steps toward enforcing their liens against it under our statutes. Crumley and St. John, the owners of the property, thereupon filed the original bill in this cause against The Reicon Co., and against The Title Guaranty & Surety Co., as surety on its bond, and against various parties claiming liens on the building for materials furnished and used in its construction, alleging the entering into of the contract with The Reicon Co. for the erection of the building, the giving of the bond for the faithful performance by the contractor of its part of the contract, the default of the contractor in the matter of paying for materials and labor, and the steps taken by lien claimants to enforce their liens, and asked that all parties claiming liens be enjoined from bringing or prosecuting other suits for the enforcement of their liens, and that they be allowed or required to set up their claims in the suit brought by complainants Crumley and St. John, and that The Title Guaranty & Surety Co. be held liable on the bond given by The Reicon Co. for all amounts which should be declared liens upon the property, and that judgment be had against The Reicon Co. and The Title Guaranty & Surety Co. for all damages and loss that complainants might suffer by reason of the defaults of The Reicon Co.

The Title Guaranty & Surety Co. answered the bill denying liability on various grounds, one of which was that the contract originally entered into between complainants and The Reicon Co. provided for the remodeling of

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the old church building and the making of certain additions thereto so as to make only a two-story hotel building thereof, and that it, The Title Guaranty & Surety Co., became surety for the construction of the two-story building only; but that that contract had been so changed without the consent of The Title Guaranty & Surety Co., and without its knowledge, as to add another story to the building and make it a three-story structure; and that the amount to be paid for the work under the contract as originally entered into, and which The Title Guaranty & Surety Co. became surety for the execution of, had, by the addition of the third story, been increased by adding thereto the sum of \$2,064.37. It pleads in the answer that by virtue of these changes in the contract between complainants and The Reicon Co. it was released on its obligation on the bond entered into by The Reicon Co. for the faithful performance of its duties as such contractor.

The Chancellor held that the contract between Crumley and St. John and The Reicon Co. had in fact been so changed that The Title Guaranty & Surety Co. was released from its obligation on the bond; and this holding of the Chancellor was appealed from, and has been here assigned as error.

The contention of complainants here is that The Title Guaranty & Surety Co. was not released from its obligation for the reason that the contract, the faithful performance of which it became the guarantor of, provided for the addition of the third story, while The Title Guaranty & Surety Co. contends that the adding of the third story to the building was not included in or provided for by the contract, but was such addition thereto as amounted to the making of a new contract, and that the bond which it signed was not meant to apply to such new contract, and

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that it was and is discharged from all obligations on the bond. Thus is formed the most serious and most sharply contested question in the cause.

The contract between complainants and The Reicon Co. was entered into on February 25, 1909, and by it The Reicon Co. undertook to provide all the materials and perform in good workmanlike manner all the work mentioned in the specifications and shown in the drawings furnished by the architect "for erection and completion of an addition to the old M. E. Church, to be used as a hotel building," etc.; and by further recitals in this contract it was agreed that the plans and specifications furnished by the architect "shall be and are hereby made part of this contract as fully as if herein incorporated"; and it was also agreed that "No alteration shall be made in the work shown or described in the plans and specifications, except upon the written order of the architect, and when so made the value of the work added or omitted shall be computed by the architect and the amount ascertained shall be added to or deducted from the contract as the case may be." The specifications which are made a part of the contract contained a provision in the following language: "The owners (Crumley and St. John) reserve the right at any time during the progress of the work, to make any addition thereto or any deduction therefrom without impairing the contract, but no work will be paid for as extra, unless a written order directing the same is signed by the architect and given to the contractor. Whenever practicable or possible the cost of any such changes, additions or deductions shall be agreed on in writings by the contracting parties before the order will be issued."

The argument and insistence on the part of complainants is that as the contract between the complainants and The Reicon Co. provided for The Reicon Co.'s furnishing

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material and doing the work mentioned in the specifications and drawings, and expressly made the specifications and drawings a part of the contract; and as the specifications thus made a part of the contract expressly provides for the making of additions to the building, and the manner of paying therefor, the adding of a third story was within its scope. On the other hand, it is contended by defendant, The Title Guaranty & Surety Co., that it was not within the contemplation of the parties that such material changes should be made as the addition of an entire story, but that by the clause in the specifications providing for changes it was meant to cover only such changes as are usual in the construction of buildings; and the evidence all indicates that in constructing buildings some modifications and changes in plans and specifications are always made necessary, and that it is usual to provide in plans and specifications for the making of changes.

It is proper in this connection to say further that complainants contended that it had been decided by complainants to add the third story before the bond was signed, and that it was signed or delivered with knowledge of the intention to add the third story, and that for that reason The Title Guaranty & Surety Co. cannot insist on being discharged from its obligation therein by the addition of the third story. This contention is correct only to the extent that it was in fact determined to add the additional story before the execution and delivery of the bond. The evidence discloses that it was decided to add the additional story on March 25, 1909, while the bond signed by The Title Guaranty & Surety Co. bears date of April 3, 1909. Yet, while such is the fact, the evidence further discloses that in truth The Title Guaranty & Surety Co. became surety on the bond for the faithful performance of the contract by The Reicon

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Co. without any knowledge of the intention or determination to add the third story, and the bond was delivered and accepted without any intention to guarantee the faithful performance of the construction of more than the two stories. A reading of the record in the case leaves absolutely no doubt as to these facts.

As to the law, both sides in their briefs have cited many authorities in support of their respective contentions; and from these and all the cases on the question we think the rule might be deduced that the question at issue is at last one of construction. In other words, the inquiry under the authorities, is what was in the minds of the parties at the time the surety obligation was signed; or, perhaps more accurately stated, what is the meaning of the contract when read in the light of the situation of the parties at the time it was signed?

All the authorities are to the effect that the making of insignificant or immaterial changes in the construction of a building will not be such a modification or change as to release the sureties on a bond given for the faithful performance of a contract for the construction of the building; but, so far as our investigations have gone, all the authorities are to the effect that the making of such material changes as the one involved in the instant case, under such contract as that between complainants and The Reicon Co., amounts to such a change of contract as to release the surety on the bond for its faithful performance where such surety has not consented to the change.

In the case of *Miller-Jones Furniture Co. v. Ft. Smith Ice & Cold Storage Co.*, 66 Ark., 287, 50 S. W., 508, it was held that a surety on a bond which had been given to guarantee the performance of a contract for the construction of a one-story building was released from lia-

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bility on the bond by such changing of the contract for the construction of the building without the knowledge of the surety as to add one story thereto; and this was held notwithstanding the fact that the contract in that case provided that the party having the building erected might make additions thereto when deemed proper, and that such additions should not affect or make void the contract. The basis of the holding in that case was that it was not the intention of the parties in entering into the contract providing for alterations, deviations and additions to include such changes as the addition of an extra story to the building. The contract in that case called for the building of the one-story structure at the price of \$7,875, and the addition of a story increased that cost to the extent of adding thereto the sum of \$1,175, or a little more than fifteen per cent of the original amount the work was to be done at. In the case at bar the price to be paid for the extra work made necessary by the addition of the third story was \$2,064.37; whereas, the original contract was \$8,300. This was the addition of nearly twenty-five per cent of the original contract price.

In the case of *House v. American Surety Co.*, 21 Texas Civil Appeals, 590, 54 S. W., 303, a surety on a bond providing for the faithful performance of a building contract was held discharged by the addition of a fourth story to a building which under the contract, the faithful performance of which was guaranteed by the surety, was to be three stories, the fourth story being added without the consent of the surety. In that case the original contract price was \$20,500, and the addition of the fourth story increased that price by adding to it \$4,500, or about twenty-one per cent of the original contract price; and in that case, as in the Arkansas case just referred to, the contract for the building provided for changes. The

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basis of the holding in that case, as was true in the Arkansas case just referred to, was that the contract did not contemplate such material changes.

In *Morgan County v. McRea*, 53 Kan., 358, a contract providing for the building of certain abutments was so changed by the addition of wing-walls as to more than double the yardage, and this was held to operate as a release of the bond given for the faithful performance of the contract.

Without further citation of cases we call attention to the proposition laid down in *Frost* on the law of Guaranty Insurance (2d Ed.), § 208, where, in treating of the effect of making material additions to, or materially varying, building contracts, such as the one involved in the instant case, it is said that "the general rule may be stated to be firmly established by the weight of authority in this country, to the effect that any material change made in the contract entered into between the 'risk' and the insured without the consent of the surety company issuing the contract insurance bond, guaranteeing the faithful performance of such contract, will serve to relieve such surety company from all liability under its bond"; for which statement many cases are cited. And we might add, though repeating, that in no case to which our attention has been called has it been held that such a material change as that involved in the instant case failed to release the surety on the bond.

We have carefully examined the many cases cited by counsel for complainants, and which it is insisted establish a contrary doctrine as applied to the facts of the case at bar, but we do not find the contention sustained by an examination of these cases. The case chiefly relied on by counsel for complainants, and often referred to in the able brief prepared on their behalf, is that of *Wehr v. St.*

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Matthews Congregation, 47 Md., 177. We have read the case with scrutinizing attention, and find the following features that distinguish it from the case at bar and from that line of cases which we think here controlling: In the Wehr case a contract existed for the construction of a building at a cost of \$35,325, which provided for changes in terms very similar to the contract in the case at bar; and there, after the work of constructing the building was entered into, it was found that the lot or plat of ground on which the building was to be placed was three and one-half feet larger than it was thought to be at the time the contract for the building was entered into. This resulted in making the building three and one-half feet longer than the original contract provided for, and there was the addition of a stone foundation instead of a brick and tile foundation, and some other changes which the Court in its opinion speaks of as of small importance. The changes, all told, increased the contract price of the building by adding to it \$900, or about two and one-half per cent of the original price, and it was held that this did not release the surety on a bond given for the faithful performance of the building contract. That case, when considered on its facts, is not authority against our construction of the contract in the instant case and our holding that the change in the building erected by The Reicon Co. released the surety on the bond. On the contrary, in the light of the facts of that case, it becomes authority for our holding. In the course of the opinion it was said:

“It is perfectly well settled that a surety has the right to stand upon the very terms of his contract; and if such contract be altered or varied in any material point without his consent, so as to constitute a new agreement varying substantially from the original, he is no longer bound.

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Mayhew v. Boyd, 5 Md., 102; *Miller v. Stewart*, 5 Wheat, 680; *Whitcher v. Hall*, 5 B. & Cr., 269; *Bonar v. Macdonald*, 3 H. L., 226, 239. And any subsequent addition to, or deviation from the contract, is such an alteration as will discharge the surety. But if, by the terms of the original contract, additions to or alterations in the work are provided for, or left to the judgment and discretion of the other contracting party, either without limits or within certain limits, then the variation, if within the limits prescribed, is allowed by the contract itself, and the surety cannot complain of a variation which he has agreed to by the original contract. *Stewart v. McKean*, 10 Exch., 675. And whether the present case falls within the principle there stated, depends upon the terms and construction of the original contract, and the nature and extent of the changes in, and additions to, the plan and finish of the work as originally contemplated. . . .

"We fully concur with the Court below in its construction of the contract. We think it clear the additions and alterations were all within the contemplations of those provisions of the original contract to which we have referred."

It is seen that the Court in the Wehr case simply ascertained the meaning of the parties in providing for changes, and held that the changes were such as were in their contemplation. The changes there made, it will also be remembered, did not include the addition of any extra story or even room, but merely the making of a building—the very building covered by the contract, a little larger—in fact, so slightly larger that the extra size and the change from a brick and tile to a stone foundation and other small changes, all told, added only about two and one-half per centum to the cost of the structure as that cost was fixed in the contract. Certainly these facts and the holding of

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the Court on them would not justify the conclusion that an entirely new story might have been added at a cost of about twenty-five per centum over the original price without releasing the surety; and yet that is what counsel in effect insist on here.

Without reviewing the other cases relied on by complainants we can say that they all involve insignificant or immaterial changes, and none of them are at all controlling. In fact, no other case relied on is so strong as the Wehr case.

Attention might here be called to the fact that, although a full extra story was added to the building, there was no extension of the ninety days' time in which it was to be finished under the contract, and, if complainant's contention is correct, The Title Guaranty & Surety Co. became the guarantor of the addition of this story in ninety days, an undertaking that some of the witnesses indicate could not have been reasonably performed—certainly one much more difficult of performance than the original undertaking. Not only this: Complainant's construction of the contract would permit, not one story added, but any number, all to be done in ninety days. The very suggestion of such a construction shows it to be falacious.

Again, it is said on behalf of complainants that, as the amounts it is sought to hold The Title Guaranty & Surety Co. for do not exceed \$3,000, the amount of its undertaking, it is in no event prejudicial to it that the third story was added. The suggestion overlooks the fact that the risk of defaults increases as the size of the construction increases, and the amount of the premium to be charged for guaranteeing risks would necessarily increase as the risks increase.

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And another view of the situation is that a surety might be willing to guarantee the faithful performance of a small contract, but not if it were materially increased in size.

Another matter insisted on is that the local agents of The Title Guaranty & Surety Co. informed complainants while the work was being done on the building that no additional bond was necessary to cover the additional story, but that the original bond was sufficient for that purpose. This contention is not well based, for the reason, whatever the local agents of The Title Guaranty & Surety Co. may have said, they had no authority to make any such representations in the matter, and complainants were chargeable with knowledge of this lack of authority. The facts are the complainants were doubtful as to whether or not the bond obligation would cover the additional story, and went to the local agents to make inquiry. The local agents thereupon wrote the general agents of The Title Guaranty & Surety Co. about the matter, and in reply to that letter received a letter from the general agent explaining that he had submitted the question to The Title Guaranty & Surety Co., and stating that he did not know whether the bond would cover the third story or not, but expressly explaining that if the third story was an addition to the original contract for which any sum was to be paid in addition to the \$8,300 an additional premium would be expected. And in another letter about the same matter this same general agent suggested that the parties enter into a formal contract for the addition to the building, and that a rider could be added to the bond. Again, the bond was not executed by the local agents. They only acted in applying for it. Complainants knew of these letters, and knew that the local agents had not signed the bond. Yet, with these matters before them clearly indicating that the local agents had no authority to sign the

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bond, and had to submit the question as to its scope to higher authority, and that even the general agent had to submit it to authority higher than he, and with the further information that if an amount in addition to the \$8,300 was to be paid for the third story, additional premium would be expected, they neither paid the additional premium nor took further steps in the matter of being protected by bond, but claim that they relied on the mere expression of opinion by the local agents; and the record shows that they knew what the local agents said was no more than an expression of their opinion. Clearly, complainants were put on notice that the local agents had no authority in the matter and that their opinion was not binding on The Title Guaranty & Surety Co.

We think there can be no doubt of the correctness of the Chancellor's holding that the surety was released, and that holding is affirmed.

There are other questions made in the case, which will be disposed of briefly. One is to the effect that the Chancellor was in error in allowing a claim of \$1,725.90 in favor of Sells Lumber & Manufacturing Co., and adjudging that for its security a lien existed on complainant's hotel property. This contention is based on the claim that in an attachment issued in favor of the claims of Sells Lumber & Manufacturing Co. the hotel property was not sufficiently described. It is not necessary to do more in this connection than say that this company had brought suit to enforce a lien against the property before complainants filed their original bill in this case, and in their bill that property was accurately described. This description found in the bill supplied any defect contained in the attachment issued thereon, and in any levy of the attachment, and the contention is not well made.

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Complaint is also made at the action of the trial Court in allowing a claim of \$276.41 in favor of Summer-Parrott Hardware Co. and declaring a lien on the hotel property for the security thereof. We find on examining the record that the decree as entered is in fact \$30 too large, and that instead of the correct amount being \$276.41, it should be \$246.41. It will be corrected accordingly in the decree of this Court. This mistake is only clerical, however, as a memorandum opinion by the Chancellor filed in the cause shows that he, in fact, found that the credit should be allowed. It was simply not allowed in drafting the final decree.

It is also assigned as error that the Chancellor allowed a claim of \$189.55, including interest, in favor of Miller Bros., and declared it a lien on the property of complainants. The complainant in this connection is that no attachment was sued out to enforce this lien, and it is true that no attachment was sued out on it. Yet the fact is the claim had been sued on before a justice of the peace before complainants filed their original bill, and the warrant gave notice that it was a suit brought for the purpose of enforcing a lien by execution as provided by our statute, Shannon's Code, § 3543. This suit at law to enforce the lien by execution was brought just before expiration of the time within which any suit for that purpose could have been brought, but within time. After the time within which this claimant could have brought suit to enforce its lien had expired complainants filed their bill enjoining the further prosecution of the suit at law by Miller Bros., alleging in their original bill the bringing of that suit. Miller Bros. obeyed this injunction, and as the time within which an attachment could have been issued had passed at the time the bill was filed, it can be seen that collec-

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tion of their claim by enforcement of the lien by execution on the one hand was stayed, complainants saying by their injunction that they could not enforce it by taking judgment at law. On the other hand, they are now saying that, as the time had expired when Miller Bros. were enjoined from enforcing their lien by judgment at law within which they could sue out an attachment, they are without remedy. Such is the logic of their position. In other, words, the position of complainants is this: Miller Bros. were proceeding regularly and legally to assert and enforce a lien for the security of the amount due them, having brought suit in a Court of law for that purpose within the time prescribed by statute; then, after the time within which an attachment could be sued out had expired, they are enjoined by complainants from further proceeding with the suit at law, and then confronted by the proposition that as they did not proceed with the suit at law, and as they have no attachment, they must fail in enforcing their lien. Such position is so inequitable and contrary to justice that no Court would think of adopting it, and we think the Chancellor was correct in holding that under the circumstances, Miller Bros.' lien had been preserved.

The Holston Electric Co. filed its petition to set up its claim for certain electric supplies furnished to the building, and was allowed a decree against The Reicon Co., but was denied relief against complainants, and have here assigned error on the decree of the Chancellor denying them relief against complainants and their property. We think the Chancellor's decree on this claim is correct, for the reason that there is a total failure to show when the electric supplies were furnished, and in that regard a failure to show that any steps were taken by that claimant to enforce its lien within the time required by statute.

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The result is the decree of the Chancellor is in all things affirmed, with the slight modification as to the claim of Summer-Parrott Hardware Co., hereinbefore noted; and complainants are taxed with all the costs. The Holston Electric Co. is not taxed with any of the costs, for the reason that the extra amount of costs put on the case by its appeal is insignificant, there having been only one short deposition taken by it.

EDWIN JOHNSTON ET AL. V. J. M. PHILLIPS, ADMINIS-
TRATOR, ETC.

Writ of certiorari denied by the Supreme Court.

(*Knoxville*. September Terms, 1912 and 1913.)

ON THE HEARING IN 1913.

1. NEW TRIAL, MOTION FOR. *Must be made in thirty days after judgment.*

That a case from a circuit or common law court, other than a proceeding essentially one in chancery in its nature, may be reviewed on anything other than its technical record a motion for new trial must be made within thirty days from the entry of judgment.

2. SAME. *Minutes must show made.*

It is necessary that the minutes of the court show that the motion for a new trial has been made, though the motion itself may not be incorporated in the minutes. If the minutes

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show the motion was made it is sufficient that the motion itself be set out in the bill of exceptions. Not even an entry on the motion docket showing such motion was made will dispense with such showing on the minutes.

ON THE HEARING IN 1913.**3. SAME. *Necessary for review of a case on writ of error.***

Although a party litigant may prosecute a writ of error after more than thirty days' time has elapsed from the date of a judgment against him, and if a bill of exceptions has been preserved in the case the writ of error takes it up, yet unless a motion for new trial was made in the trial court the case on the writ of error cannot be reviewed in an appellate court on more than the technical record.

4. TECHNICAL RECORD. *What constitutes.*

The technical record is made up and consists only of the process, pleadings, minute entries, the verdict and judgment; under which is included such bonds as authorize the court to enter judgments on them in the case, as they partake of the nature of pleadings and process in that they enter the appearance of the parties signing them and authorizing judgments on them in case of defaults.

5. SAME. *Errors appearing on, reversible without motion for new trial.*

Errors which appear on the technical record, including such bonds as those named, and which do not depend on matters that have to be brought into the case by bill of exceptions, can be reviewed without motion for new trial in the trial court.

6. REPLEVIN BOND. *When to be treated as in double the value of the property attached rather than double the amount of plaintiff's demand.*

Where suit was brought to recover \$20,000.00 and property was attached, a replevin bond was given in the penalty of \$1,200.00 conditioned to produce the property or pay the value of it, without in express terms being made payable either in double the amount of plaintiff's demand, or in double the value of the property attached, as provided in Shannon's Code, § 5269,

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the bond must be regarded as given in double the value of the property attached, although the value of the attached property be not fixed in the bond, and such bond may be satisfied by return of the property.

FROM KNOX COUNTY.

Appeal from the Circuit Court of Knox County. Von A. HUFFAKER, Judge.

PICKLE, TURNER & KENNERLY for Plaintiff Below.

WEBB & BAKER for Defendant Below.

MR. JUSTICE HUGHES delivered the opinion of the Court.

THIS suit was brought in the Circuit Court of Knox County by J. M. Phillips, the administrator of the estate of Hubert Phillips, his deceased son, to recover damages for personal injuries inflicted on the deceased by running an automobile over him, which resulted in his death. The suit was brought against Edwin Johnston, Roy A. Johnston and their mother, Mrs. Willie B. Johnston, but a demurrer was sustained as to Mrs. Johnston, and she was discharged from further liability. Therefore the case need not be further noticed as to her. The case went to trial on an issue of not guilty as to Edwin Johnston and Roy A. Johnston, and a verdict was returned against them and in favor of plaintiff below for \$6,750, on which judgment was entered, but on a later date a remittitur of \$1,750 was suggested and accepted under protest, and the judgment reduced to \$5,000. Edwin and Roy A. Johnston appealed from that judgment, and have assigned

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errors. Defendant in error has also brought the case here by writ of error, and asks that the judgment for \$6,750 be restored.

A motion was made in this Court to dismiss the appeal of plaintiffs in error and set aside the action of the lower Court in requiring and entering the remittitur, because no motion for a new trial was made within the time required by law. The facts on which that motion is based are these: The verdict of the jury in this case was returned and judgment rendered and entered thereon on November 16th, and, so far as the minutes of the Court show, no motion for new trial was made until December 21st, or more than thirty days thereafter; and it was at this time the remittitur was suggested and the judgment cut down from \$6,750 to \$5,000, and the appeal prayed by the Johnstons. The bill of exceptions, however, recites that defendants below moved the Court for a new trial immediately after the rendition of the verdict for \$6,750, and that the Court overruled that motion and that judgment was then rendered on the verdict, and that the Johnstons then prayed their appeal. In other words, taking the bill of exceptions, it would appear that the motion for new trial was made and overruled at once on the rendition of the verdict, and that the appeal was thereupon at once prayed from the judgment of \$6,750; whereas, the entry on the minutes show no motion for a new trial until after more than thirty days after the rendition of the verdict and entry of the judgment, and show that after the Court had suggested the remittitur, which was likewise more than thirty days after the verdict and judgment, and it had been accepted under protest and judgment modified accordingly, the appeal was prayed from the \$5,000, rather than from the \$6,750 judgment. In this state of the record, what is the law?

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Under the holding in *Railroad v. Egerton*, 14 Pickle, 541, the motion for a new trial should have been entered on the minutes of the Court and the omission to do so cannot be supplied by recitals in the bill of exceptions; and under the holding in the case of *Ellis v. Ellis*, 8 Pickle, 471, a motion for new trial cannot be made after the expiration of thirty days from the rendition of judgment unless an extension of the time has been given for that purpose. Yet in the case of *Box Co. v. Gregory*, 11 Cates, 537, the holding in the Egerton case is modified, the Court there holding that by virtue of Acts 1875, chapter 106, where the minutes of the Court show the motion for a new trial the motion itself may be set out in the bill of exceptions, it being pointed out in the last named case that in the Egerton case the minutes of the Court showed no motion for a new trial, whereas in the Box Co.-Gregory case the minutes did show that a motion for a new trial was made, and the motion itself was in the bill of exceptions. After pointing out the distinction between the Egerton case and the Box Co. case our Supreme Court uses this language, referring to the statute of 1875:

"Moreover, we are of the opinion that the statute above quoted not only requires that a motion for a new trial shall be filed, stating the grounds on which it is sought to question the action of the Court below, but that this motion may be brought up to this Court in the bill of exceptions. It should, however, appear upon the minute books that such a motion has been made, and the disposition of it, and there should be at least a reference to the motion on file, such as was made in the case now before the Court."

We understand this language, and the holding in the case in which it is used, to mean that it is indispensable that the minutes of the Court should recite the making of the motion within thirty days after judgment is entered.

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This does not appear in the case at bar, and we are constrained to hold that the appeal is not properly before us and to entertain the motion, which is accordingly done; and the defendant in error having brought the case up on writ of error, judgment will be entered for the full \$6,750 and costs. We have not overlooked the fact that, as shown by certified copy of certain entries on a motion docket, brought up on suggestion of diminution of record, there is a showing that a motion for new trial was made on November 16th, or within the thirty days. But as we understand the holding just referred to, this fact can no more be shown on a motion docket than in the bill of exceptions.

Even if the appeal be treated as bringing the case to this Court, still there is in legal effect no motion for a new trial, an indispensable prerequisite, as the practice is now well settled, to the assignments by plaintiffs in error of the errors they have insisted on before us, none of those assignments being based on the technical record. *Road Commissioners v. Railroad*, 15 Cates, 257.

These observations and our holding in this case, it is proper to observe, apply only to such cases as the one now before the Court, and not to those in their essential nature Chancery proceedings, such as divorce proceedings, though brought in the Circuit Court.

(The foregoing opinion was handed down in 1912. The case was then again before this Court in 1913, when Mr. Justice Hughes again delivered the opinion of the Court.)

After this case was finally disposed of in this Court at its last term here, Edwin Johnston and Roy A. Johnston carried it to the Supreme Court by petition for certiorari, and the judgment of this Court was by that Court affirmed on November 2, 1912. A procedendo was then issued to the Circuit Court of Knox County by the clerk of this Court and the Supreme Court, and on March 29,

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1913, plaintiff below, J. M. Phillips, moved the Circuit Court to enter the procedendo and order an execution on a delivery bond which had been given for the automobile that had caused the death of deceased, and which, while the case was pending in the Circuit Court of Knox County was attached under the provisions of Acts 1905, chapter 173, section 5. The Circuit Court granted that motion and permitted the procedendo containing a copy of the judgment of this Court and a copy of the judgment of the Supreme Court entered on its minutes; and after reciting that the judgment of this Court and of the Supreme Court had not been paid or satisfied, and that the automobile which had been attached in the case when the suit was brought in the Circuit Court, and for the delivery of which the delivery bond had been given, had not been delivered to the sheriff of Knox County, as ordered by the judgment of the Circuit Court rendered in November, 1911, ordered that execution issue against John F. Goode, the surety on the delivery bond, in the sum of \$1,200, the penalty of the bond. From this action of the Court awarding execution for the \$1,200, Goode, the surety, prayed an appeal to this Court, but the appeal was denied him. He then brought the case here on writ of error, and duly complains at the last action of the Circuit Court. He also obtained from one of the members of this Court, before the convening of the present term, a *supersedeas* staying further proceedings on an execution against him. Roy A. Johnston and Edwin Johnston also now seek to have the case reviewed on its merits as to them on writ of error.

Roy A. Johnston and Edwin Johnston make the same assignments of error that they made when the case was before this Court on their appeal one year ago, and insist that, as the judgment of the lower Court was heretofore affirmed by this Court and the Supreme Court because

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there was in legal effect no motion for a new trial made in the trial Court within thirty days as required by law, and the case was therefore not heard here and in the Supreme Court on its merits, they have the right to have the case now heard on its merits on their writ of error. They insist that the prosecution of a writ of error is in legal effect the bringing of a new suit, and that the rule of practice prohibiting a rehearing on appeal where no motion for new trial was made within thirty days has no application to hearings here on writs of error, and can have none, for the reason that, as a matter of law, they have a right to the writ of error and a hearing thereon after more than thirty days has elapsed and within the time they prosecuted their writ of error in said case.

While it cannot be questioned that a party litigant may prosecute a writ of error after more than thirty days' time has elapsed from the date judgment has been rendered against him, and while it is true that if a bill of exceptions has been made up and filed in a case in the proper time, the taking of the case up by writ of error takes with it the bill of exceptions, it does not necessarily follow that the case can be reviewed on anything other than the technical record on writ of error when no motion for new trial was made within the thirty days as required by law. To hold that a party who has failed to make his motion for a new trial within the thirty days cannot for that reason have his case reviewed on more than the technical record on appeal, but that he can have it so reviewed on writ of error under the same state of facts and on the same record, would be to wholly set at nought the rule requiring motions for new trials to be made within thirty days, for the very apparent reason that in such case, although a party has failed to get a review on appeal, all he must do to reach the same end is to prosecute his writ of error. Such prac-

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tice would not only wholly nullify the rule requiring motions for new trials to be made within thirty days, but would, in effect, repeal the statute lying back of this rule. For these reasons such practice cannot be indulged by Appellate Courts. Nor does it deprive parties of any constitutional right, as insisted in this case it would, to hold that they, under such circumstances as are here presented, are not entitled to have a review of their cases on writs of error, any more than to hold that they are not entitled to such review on appeal. In truth the practice of requiring motions for new trials preliminary to a review of cases in Appellate Courts is one adopted by the Courts themselves, and refusing parties the right to have their cases reviewed on appeal where no motions for new trials have been made goes as far toward depriving them of rights as litigants as the refusal to review cases on writs of error for the same reason can go.

For these reasons we are constrained to hold that Roy A. Johnston and Edwin Johnston are not in a position to invoke the action of this Court on the merits of their case on writ of error, and the writ of error is dismissed.

As to the questions presented by John F. Goode, surety of Roy A. Johnston on the delivery bond, a different situation is presented. Mr. Goode was not before this Court one year ago, either by appeal or writ of error, and the judgment of the trial Court then showed that in addition to rendering judgment against Roy A. Johnston and John F. Goode on the delivery bond it was ordered that, if Johnston delivered the automobile within thirty days of the final judgment of that Court to the sheriff of Knox County for sale to enforce the lien declared against it, the judgment for \$1,200 rendered on the bond would be null and void. The last judgment of the Circuit Court, the one entered on the procedendo rendered in March, 1913, on the con-

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trary, ordered the execution for the \$1,200 without any option to return the automobile; and this is one of the matters of which Mr. Goode now complains.

It occurs to us that, as the judgment now against him does not accord the same privileges the final judgment rendered in 1911 accorded, Mr. Goode might have rights now that should not be denied him—certainly the right to have the question reviewed. But it is said by defendant in error that he made no motion for new trial when this last order was entered against him in the Circuit Court, and for that reason he cannot have that order reviewed in this Court. This contention is correct, except that, as is well settled, the fact that no motion for a new trial was made would not preclude this Court from reviewing any question that arises on the technical record, which, as is stated in *History of a Lawsuit* (4th Ed.), page 324, “consists only of the process, pleadings, and entries on the minutes, including the entry of the verdict and judgment”; or, as said in *Duane v. Richardson*, 22 Pickle, 81, “the process, pleadings, minute entries, verdict and judgment are matters properly constituting a perfect record (the technical record), in the absence of a bill of exceptions, and can be reviewed though there may be no bill of exceptions made or filed or incorporated in the transcript.” This Court is of opinion the delivery bond must be treated, under these announcements, as a part of the technical record, as it is in effect, as is true of all such bonds, a part of the pleadings and process by virtue of its entering the appearance of the parties signing it and authorizing the Court to render judgment on it against such parties in the event of a breach of its conditions, though not strictly a part of the pleadings and process within the technical meaning of those terms. In 2 Elliott’s Gen. Pr., § 1056, which has met the express approval of our Su-

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preme Court in *Darden v. Williams*, 16 Pickle, 414, it is said: "The office of a bill of exceptions is to bring into the record matters that are not part of the record proper. . . . Where the statute does not otherwise provide, the record proper consists of the pleadings, the rulings thereon, the issue, the impaneling of the jury, the verdict, and the judgment. Direct motions are part of the record, but collateral motions are not." From this it is seen that the "record proper," which is but another term for technical record, includes such matters as rulings on pleadings, and, in addition to the pleadings, the "issue," and direct motions; and that its office is only to make a part of the record that which is not already a part. And according to the *Darden-Williams* case just referred to, "the office of the bill of exceptions is to put in permanent form and bring into the record that which transpires during the trial of the cause, and which is not part of the record proper." See also *Shelby County v. Bickford*, 18 Pickle, 395. The reasons which exclude mere affidavits made in the progress of the trial (*Jones v. Stockton*, 6 Lea, 133; *Dinwiddie v. Railroad*, 9 Lea, 309); an account constituting evidence in the case (*Cornelius v. Merritt*, 2 Head, 98; *Stockell v. Ryan*, 1 Bax., 476), and like matters, from being a part of the technical record have no application here.

In the light of the authorities referred to, and all the authorities, we think it clear the bond in question should not be treated as such matter transpiring during the progress of the case as to necessitate its being brought up by the bill of exceptions, and that it must be treated as part of the technical record or record proper; and we will so treat it.

The difference in the requirement of a motion for new trial when the matter sought to be reviewed is dependent

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on the technical record and when dependent on matters to be preserved by bill of exceptions appears from the following excerpt from the opinion of our Supreme Court in *Railroad v. Johnson*, 6 Cates, 632: "The jurisdiction of this Court is exclusively appellate, and it can only pass upon matters which the record shows has been considered and adjudged by the trial Court from which the case has been appealed. The error reviewed and corrected by it are of two classes: (1) Those which appear upon the face of the record proper, as erroneous rulings in sustaining or overruling motions, and demurrers challenging the sufficiency of pleadings; and (2) errors committed in allowing or overruling motions for new trials upon grounds brought into the records by bills of exceptions, as for improperly refusing a continuance, the admission of incompetent evidence, or the rejection of competent evidence, error in instructing the jury, or refusing further instructions seasonably requested in proper form, for want of evidence to sustain the verdict, or other similar ground. It does not act directly upon errors of the latter class, which are not a part of the record without a bill of exceptions, but upon the action of the trial Judge for refusing a new trial because of such errors committed by him, or otherwise occurring in the progress of the case, as they may be waived or corrected before verdict. Therefore, before the jurisdiction of this Court can be invoked and relief had on account of errors of the second class, they must be considered and acted upon by the trial Judge in the disposition of a motion made by the losing party to set aside the verdict of the jury and allow him a new trial."

See also *Railroad v. Brown*, 1 Tenn. C. C. A., 269.

The matter complained of by the surety on the delivery bond clearly appears from the technical record, and we

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think it reviewable. We will now proceed to examine his contentions.

The Circuit Court, on the case being remanded, simply ordered the execution on the judgment for \$1,200, and did not give the option to return the machine as had been given in its judgment which was affirmed by this Court and the Supreme Court, as we have already observed, and in this, which Goode complains of, we are of opinion there was error. This Court had simply affirmed the action of the lower Court in giving that option in its previous judgment, and when this Court remanded the case for the carrying out of the previous orders of the lower Court it carried with it the right to exercise the option of returning the machine, and the judgment of the Supreme Court affirming the judgment of this Court had the same effect. It is true the machine had not been returned within the time originally fixed by the Circuit Court, but the case had been appealed, and while the appeal was pending it could not have been reasonably required of the parties that they deliver the machine to the sheriff.

There is still another view of this case that would entitle the surety to the relief sought to the extent of having the opportunity of returning the machine, which grows out of the following: By Shannon's Code, § 5269, it is provided that, "The defendant to an attachment suit may always replevy the property attached by giving bond, with good security, payable to the plaintiff, in double the amount of the plaintiff's demand, or, at defendant's option, in double the value of the property attached, conditioned to pay the debt, interest and costs, or the value of the property attached, with interest, as the case may be, in the event he shall be cast in the suit;" and by § 5274 it is provided that, "The Court may enter up judgment or de-

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cree upon the bond, in the event of recovery by the plaintiff, against the defendant and his sureties for the penalty of the bond, to be satisfied by the delivery of the property, or its value, or payment of the recovery, as the case may be."

The bond given by Roy A. Johnston for the delivery of the automobile provided that if Johnston should, upon the termination of the litigation, "produce said automobile in as good condition as at the time said levy was made free from all incumbrances," etc., "or pay the value thereof, then this obligation to be null and void." As the amount sued for in the Court below was \$20,000, and as the penalty of the delivery bond was only \$1,200, and as the bond provided for the return of the property, it is clear that it was not given with the idea of its being in double the amount of plaintiff's demand, but rather in double the value of the property attached, although the value of the machine was not fixed in the bond, as should have been done.

In the case of *Muhling v. Ganeman*, 4 Bax., 88, a delivery bond in an attachment suit was involved, and the bond there, as here, did not fix the value of the property, but it is apparent that it was meant to be in a sum double its value, and it was so treated by the Supreme Court, although, as pointed out, it did not conform to the statute, not being clearly a bond either for double the amount of plaintiff's demand or in double the amount of the property attached. After pointing out that, notwithstanding this defect, the bond must be treated as one for double the value of the property, our Supreme Court said:

"The proper decree in such case is for the penalty of the bond, which may be satisfied by paying the value of the property, with interest from the date of the bond on returning the property. . . . The decree should also

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have allowed the defendants to satisfy this judgment by paying the value of the property, with interest from the date of the bond. This should be ascertained by reference."

Likewise, in *Kuhn v. Spellacy*, 3 Lea, 278, a delivery bond in an attachment case had been given, of which our Supreme Court said:

"The bond is not strictly a statutory bond; that is, it is not in terms, either in double the amount of the plaintiff's demand, conditioned to pay the same, or in double the value of the property attached conditioned to pay its value, in the event he be cast in the suit as provided by § 3509 (Shannon's Code, § 5269), but its condition being to account for the property, it should be regarded as falling under the latter class; that is, a bond in double the value of the property attached, conditioned to pay its value and interest in the event the defendant be cast in the suit. The proper judgment on this bond, as prescribed by § 3514 (Shannon's Code, § 5274), was a judgment for the penalty of the bond, which may be satisfied by the delivery of the property or its value. . . . The obligors of the bond, by its very terms, had the right to discharge it by returning the property in as good condition as it was at the time it was replevied, and to return in the place of the property its value with interest would be equally just to the complainant. This is the provision of the statute as to statutory bonds, and we think this bond is subject to the same rule. The difficulty of showing the value of the property, or the imperfect and indefinite terms of the levy ought not to operate in favor of one party more than the other."

We think the holdings in these cases are controlling in the case at bar, rather than the holdings in the case of *Dale v. Heffner*, 4 Bax., 217, and *Bond v. Greenwald*,

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4 Heisk., 453, 472, for the reason that the bonds in the last named cases were held to be for the payment of the debt or demand of the plaintiff, rather than payment of the value of the property replevied or represented by the bond. We are, therefore, of the opinion that under the obligation assumed by the bond the parties thereto have the right to return the automobile or account for its value at the time the bond was given and Roy A. Johnston repossessed himself of it, and the judgment of the Circuit Court is to that extent modified, and the case will be remanded to be further proceeded with as to that matter.

Roy A. Johnston and Edwin Johnston having failed in their writ of error, but John F. Goode, the surety on the delivery bond, having succeeded in his writ of error, the costs incident to these writs of error and the proceeding now before this Court will be paid one-half by defendant in error, J. M. Phillips, and the other half by plaintiffs in error, Edwin Johnston and Roy A. Johnston, and the sureties on their bonds.

Peete v. Jackson.

W. R. PEETE & COMPANY V. LILLIE JACKSON.

Writ of certiorari denied by the Supreme Court, except
as to damages.

(*Jackson*. April Term, 1913.)

1. NEGLIGENCE. *Driving stubborn mule with small bit. Negligence of driver.*

The owner of a mule of a stubborn and unruly disposition is liable for injury to a pedestrian on street occasioned by negligence of the driver aggravated by the insufficiency of the bridle to hold the animal in check.

2. SAME. *Contributory negligence of pedestrian. Question for jury.*

Whether the conduct of a pedestrian injured by contact with a runaway mule was negligent was a question for the jury.

3. DAMAGES. *Loss of time. Failure to aver same in declaration. Instructions.*

It is error for the court to instruct the jury to include in the verdict damages for plaintiff's loss of time unless this loss of time is averred in the declaration.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County. Division No. —. A. B. PITTMAN, Judge.

FRANK ELGIN for Plaintiffs in Error.

S. G. CHILDRESS and B. F. POWELL for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

Peete v. Jackson.

ON the 2d day of November, 1911, Miss Jackson was injured as the result of a collision with a mule driven by a negro servant of plaintiff in error on Main street in the city of Memphis. She brought suit for the injuries thus sustained. She predicated her right of action in the main upon three grounds of negligence; namely, that the mule was a wild and unruly one, that it did not have in its mouth a bit of sufficient strength and character to enable the driver to control it, and that the negro was negligent in his manner and method of driving and controlling the animal. She recovered a verdict of \$1,500. Of this amount, \$750 was remitted under protest and is the subject of a cross-appeal by her. The owners of the mule made a motion for a new trial, and failing therein have brought the case to this Court, and have assigned errors. While the declaration contains other matters than those referred to, we do not deem it necessary to refer to any other parts of it.

It is first urged that the evidence does not sustain the verdict, or rather, that the verdict is without material evidence to support it. We can dispose of this assignment briefly by stating that there was evidence tending to show that the bit attached to the bridle was so small that the driver could not restrain the animal. This was a question for the jury. We judicially know that mules are stubborn animals, and that this trait, coming from their paternal side, not only tries the steel in the bit, but likewise the patience and strength of mankind. This mule was six or seven years of age, was about seventeen hands high, of very heavy, strong build, and *mulish* in disposition. An animal of this kind is hard to manage, especially when it takes a fit of "studs" in imitation of its *grand* sire. The evidence is to the effect that when the mule came dashing down Main street it was on the

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wrong side of the driveway and was rearing and plunging. This is some evidence, although slight, that the bit was not strong enough or of the kind adapted to the holding of such animals in check.

Another significant feature is to be found in such facts or circumstances as would afford an inference that the mule was a wild one. When the negro driver was approached after the accident and asked for an explanation, he, among other things, said that the animal was wild and that he could not control it, or had lost control of it. This was not objected to and is in the record for evidential purposes. This declaration is very cogent, coming as it does from the servant who for many weeks had been driving the mule. The insistence as to wildness is strengthened by the conduct of the mule just before and at the time of the accident; and there is corroboration in the feeble after-explanation offered by the driver that while standing in the street before the mule started on the run, someone walked in front and frightened the animal by tapping him on the head.

Taking up another phase, namely, the negligence of the driver, there is some warrant for the inference that he did not exercise proper care in his efforts to control the animal, even according to his own statement.

These several matters were presented to the jury by the Court under a reasonably clear statement. We are constrained to say that there is evidence tending to support the theory of the plaintiff below.

It is next urged that Miss Jackson was guilty of proximate contributory negligence. She was passing from one corner of Main street to another corner. After leaving the sidewalk she saw the mule coming and started to turn, but before getting out of the way the mule ran against her. We are unable to say that as a matter of law she was

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guilty of contributory negligence. It would be hard to pronounce any conduct caused by a runaway mule negligent. The rule to be applied was that of ordinary care under the circumstances, and this was for the jury. It was submitted to them and found in her favor, and we cannot disturb their finding.

No authorities are needed for the proposition that if the averments of the declaration are supported a recovery is authorized. 43 Fed., 358. It is negligence to go into a much-traveled highway with a wild or unruly animal if not harnessed with reasonable security so as to be held in check, or to place the animal in charge of a driver who does not exercise reasonable care in his efforts to control him. It is undoubtedly true that if this animal was of ordinary gentleness and if he became frightened because of the intervening act of some third party, there could be no recovery. His Honor so told the jury. But even in such case, there is still the duty resting upon the driver to exercise every reasonable precaution to hold the animal in check and prevent injury while driving upon a street filled with people.

It is said in the fourth assignment of error that the Court instructed the jury that they might award Miss Jackson a recovery for loss of time from her employment, and that the fact that her employers continued her pay voluntarily was not material. We are of opinion that the proposition in the abstract as laid down by the Court is sound. But, as applied to this case, the instruction was erroneous, for the reason that there was no averment of loss of time in the declaration. But we are of opinion that the error thus committed was effectually cured by the large remittitur required by the Court, and that this assignment should be overruled.

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In the third assignment the amount of the verdict is assailed. It is appropriate that we in this connection take up the matter of the cross-appeal predicated upon remittitur. After carefully examining the record, we have reached the conclusion that we should not disturb the action of the Court in requiring remittitur, and that we should likewise approve his holding that \$750 was not excessive. Appellate Courts must treat the actions of Circuit Court Judges on these matters with the gravest consideration. While we think the remittitur was a liberal cut, we are not unmindful of the fact that the learned Judge had the young lady before him and could himself judge of the extent of her injuries.

Upon consideration of the whole case we have reached the conclusion that it should be affirmed, and that the plaintiffs in error should pay all the costs.

W. L. BASS v. ARDERY, EDWARDS & Co. ET AL.

MARK L. BASS v. ARDERY, EDWARDS & Co. ET AL.

(Nashville. September Term, 1913.)

1. **LIBEL.** *Publication in a judicial proceeding. When privileged.*

A publication made in a judicial proceeding, although made with malice, if pertinent to that proceeding, or if fairly supposed to be pertinent, is not libelous, but is privileged.

2. **SAME.** *Same. Courts judges of pertinency.*

The question of pertinency is one of law for the Court.

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3. SAME. *What not pertinent. Case in judgment.*

Charges made in a bill filed in chancery by one tenant in common against his co-tenant to collect his part of the value of timber destroyed, to the effect that the party destroying the timber or having it done, had taken the timber and refused to account to his co-tenant, or had conspired with others to do so, and that he with another had partitioned the lands for the purpose of acquiring homestead to defeat the collection by the co-tenant of his part of the value of the timber destroyed; and charging those who had been guilty of such conduct with being unscrupulous and risky, men who would commit trespasses on their neighbors' lands, take valuable timber therefrom and cover up and smuggle their conduct to avoid liability, are not libelous.

4. SAME. *Same, Presumed privileged. How presumption overcome.*

A publication made in a judicial proceeding is *prima facie* privileged, and the burden is on the party alleging that it is libelous to make a showing against the presumption of privilege. And to make that showing facts, not legal conclusions, must be alleged.

5. SAME. *Same. Action on, when brought.*

An action on a libel published in a judicial proceeding can be brought only when the proceeding in which the libel was published has terminated, or when the libelous matter has been stricken out and eliminated therefrom.

FROM FRANKLIN COUNTY.

Appeal from the Circuit Court of Franklin County.
NATHAN BACHMAN, Judge.

FLOYD ESTILL and ARTHUR CROWNOVER for Plaintiffs in Error.

FRANK L. LYNCH, J. D. FULTS and M. T. BRYAN for Defendants in Error.

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MR. JUSTICE HUGHES delivered the opinion of the Court.

THE same legal questions are involved in these two cases. They were, therefore, heard together in this Court, though separate actions. Demurrers in both were sustained in the Circuit Court of Franklin County, and the suits dismissed. After a demurrer had been filed in each case, permission was sought and obtained to make certain amendments to the declarations, but the amendments do not appear to have actually been made. The parties appear, however, to have treated the declarations as actually amended by proper allegations of the facts sought to be set up by the amendments, and we will so treat them.

The plaintiff in each of the two cases seeks to recover damages for alleged libelous publications made by defendants. The libelous publications, it is alleged, were made in a bill filed in the Chancery Court at Winchester, Tennessee, by defendants, Ardery, Edwards & Co., and the individuals composing that firm; and the controlling questions are, first, whether or not the publications were privileged; and, second, whether or not it is necessary, in a suit for damages for libelous publications made in a judicial proceeding, to allege and show that the proceeding in which the libel was published had terminated, or that the libelous language had been eliminated from the suit in which it was published; neither being alleged in the case at bar.

The declaration filed by William L. Bass contains six counts. The first of these counts charges the defendants, the firm of Ardery, Edwards & Co., and the individual members thereof, with "falsely and maliciously composing and publishing of and concerning plaintiff, who was defendant in said bill in Chancery, the following language:

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“That the defendant Wm. L. Bass from time to time, for the last six or eight years, and it may be longer, has authorized his sons to go upon the above described tract of land (meaning the tract of land owned jointly by defendant, Pearson, and the plaintiff) and take the valuable saw-log, cross-tie and cedar timber therefrom, and sold a considerable amount of timber from said tract of land to his said sons and others, and has utterly failed and refused to account to said Pearson for the value of one cent of the timber taken from said tract of land”; and charges that by that publication the defendants in this libel suit, who were complainants in the Chancery suit in which the publication was made, meant that Bass was guilty of a breach of trust and a betrayal of confidence, and to charge him with dishonesty and with being guilty of a fraud; all of which, it is charged, was done with intent to defame him, William L. Bass, and hold him up to public hatred, scorn and scandal, contempt, derision and ridicule, and to cause him to lose the good will, confidence, esteem and respect of the public and of those with whom he was wont and accustomed to associate. The second count makes the same charges, adding simply that by the publication in the bill in Chancery the plaintiffs therein, the defendants in the suit for libel, had entered into a conspiracy with his sons to defraud and betray the confidence of Pearson, his co-tenant in the lands, with intention to defraud, etc. The third count alleges that defendants falsely and maliciously composed and published in the bill in Chancery of and concerning plaintiff, defendant in the bill in Chancery, that after he was notified to not take the timber from the lands, he had procured a surveyor and gone onto and divided the lands into two tracts so as to set up homesteads in them, and “in that way cheat, wrong and defraud their (his) creditors out

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of their debts, and especially your complainant's debt"; which publication it is alleged was made with intent to defraud, etc. The fourth count of William L. Bass' declaration, and the first count of Mark L. Bass' declaration charge the defendants, complainants in the bill in Chancery, with falsely and maliciously composing and publishing of and concerning them in the Chancery bill as follows: "Your complainants (meaning the defendants) further charge that defendant, Wm. L. Bass and Mark L. Bass (meaning the plaintiffs) are non-scrupulous and risky men and will commit wastes and trespasses upon their neighbors' lands and take their valuable timber, and then cover up and smuggle their conduct and shun and avoid their just debts and liabilities"; by which publication it is alleged the defendants meant that plaintiff's, William L. Bass and Mark L. Bass, had fraudulently and falsely taken and carried away their neighbors' timber and thereby violated the criminal laws of the State. The fifth count of William L. Bass' declaration, and the second count of Mark L. Bass' declaration, charge the same publication last set out, simply varying the charge by alleging that the defendants had aided, abetted, counseled, hired and procured the publication made; and the sixth count of William L. Bass' declaration, and the third count of Mark L. Bass' declaration, simply charge the same publication, charging that defendants conspired in making the publication. Mark L. Bass' declaration contains only the three counts.

So it is, the two suits are based alone on publications or statements made in a bill in Chancery, which are alleged to have been made with wrong motive and for the purpose of doing injury to plaintiff's and by the amendments which we have treated as made, it is simply added "that the expressions sued on were irrelevant and not per-

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tinent to that case or the issues in the said Chancery suit, and that said statements were not privileged"; but nowhere in the declarations, as originally drafted, nor in the amendments, is it set out and shown what the suits in Chancery was brought for, or the subject matter and object of the suit, further than is disclosed in, and can be inferred from, the quotations already herein made. From the quotations made it appears that that suit was probably brought to recover the value of timber taken, or alleged to have been taken, from lands belonging to J. K. P. Pearson, a member of the co-partnership of Ardery, Edwards & Co., and one of the defendants in these actions on the alleged libelous publications, and that the defendants in that suit, the plaintiffs in the cases under consideration, had refused to account to Pearson for his part of the timber so taken, and in order to evade paying therefor the plaintiff William L. Bass had procured a surveyor and divided the lands so as to render the interest owned by William L. Bass exempt from execution by making it subject to the homestead right; and that the defendants in the Chancery suit, the plaintiffs in the suits at law, were the character of men who would do these things. But this is only what we conceive to be a legitimate inference as to the nature and object of the Chancery suit from the meager disclosures in the declarations on those questions.

Under the state of facts just set out, one of the questions arising, and made by the demurrers, is whether or not such publiactions are privileged; and this brings us to the principles of law bearing on and controlling such publications as are here sued on with reference to their being privileged or otherwise.

We have a number of cases in this State bearing more or less on this question, but think it unnecessary to review any of them except that of *Crockett v. McLanahan*,

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1 Cates, 517, as that case reviews practically all of the prior pertinent cases. In the case referred to, speaking with reference to the nature of publications made in pleadings in suits, as to becoming the bases of actions for libel, and quoting with approval from the earlier case of *Lea v. White*, 4 Sneed, 113, it is said:

"The communications are, on account of the occasion on which they are made, *prima facie*, or, as the books have it, 'conditionally privileged; that is, they do not amount to defamation (actionable) until it appears that the communication had its origin in actual malice in fact.' In such cases it will be incumbent on the plaintiff to show, in addition to the injurious publication, malice in fact, and that the occasion was seized upon as a mere pretext. . . . The proceedings connected with the judicature of the country are so important to the public good, the law holds that nothing which may therein be said with probable cause, whether with or without malice, can be slander, and in like manner that nothing written with probable cause under the sanction of such an occasion can be libel. The pertinency of the matter to the occasion is that which is meant by probable cause."

And, quoting in part with approval from the case of *Shadden v. McElwee*, 2 Pickle, 152, it is further said in the *Crockett-McLanahan* case that, "where the matter alleged is pertinent to the issue, or fairly supposed to be so, although not in the strictest sense relevant, the pleader is absolutely privileged, although he may have entertained sentiments of malice to the adverse party.' It is, moreover the rule that the question of pertinency or relevancy is a question of law for the Court. *Lea v. White*, 4 Sneed, 111; *Shadden v. McElwee*, 86 Tenn., 152 (5 S. W., 602; 6 Am. St. Rep., 821); *Jones v. Brownlee* (Mo.), 61 S. W., 795 (53 L. R. A., 448)."

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These quotations establish these propositions: First, that if the alleged libelous publication made in a judicial proceeding is pertinent to that proceeding it is not libelous, although it may be made with malice; and, second, that whether pertinent or not it will be privileged if fairly supposed to be pertinent; and, third, that the Courts are the judges of the question of pertinency.

Applying these principles to the cases under consideration, we do not see how it could be said that the charge, made in a bill in Chancery filed by one tenant in common against his co-tenant to collect his part of the value of timber destroyed, to the effect that the party destroying the timber or conspiring to have it done, had taken the timber and utterly failed and refused to account to his co-tenant for the value, or that he had conspired with others to do so, and that he had himself, jointly with another, partitioned the lands for the purpose of acquiring homestead in them with the object of defeating the collection by his co-tenant of his part of the value of the timber destroyed; and to charge those who had been guilty of such conduct with being non-scrupulous and risky, and being men who would commit trespasses on their neighbors' lands, take valuable timber therefrom, and cover up and smuggle their conduct to avoid liability, could be held impertinent. It occurs to us if the suit in Chancery was of the character we have assumed it was, the allegations made therein alleged to have been libelous would have been not only such as might have been supposed to be pertinent or relevant, but such as any Court might have held pertinent or relevant.

But it might be said that this Court's inference as to the nature, scope and object of the bill in Chancery is not correct; and it is admitted that such might be entirely true, as the scope and object of the bill are not clearly

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disclosed. The reply to that proposition would be that the very failure to allege the scope and object of the suit in Chancery is itself a fatal defect in the declarations. How can this Court know that the language used in the bill in Chancery was not pertinent without an allegation of the nature of that suit? Such allegations in judicial proceedings are *prima facie* privileged and the burden is on the party alleging that they were libelous to make a showing against the presumption that they were privileged.

It is true the amendment, treating it as having been made, charges that the language complained of, and which it is alleged was libelous, was "irrelevant and not pertinent to that case or the issues in said Chancery suit"; but this is only the allegation of a legal conclusion, and not the allegation of a fact; and the *Crockett-McLanahan* case is directly in point on the proposition that the declarations in such suits as those under consideration must allege the facts and not mere legal conclusions. See also *Cotton Oil Co. v. Shamblin*, 17 Pickle, 263; and *Cumberland, Etc., Co. v. Cook*, 19 Pickle, 730; and cases cited in the *Crockett-McLanahan* case.

The next question is whether or not the declarations were demurrable because it was not alleged in them that the Chancery suit had been terminated.

The case of *Masterson v. Brown*, 72 Fed. Reporter, 136, is in point here. In that case it was held that the statute of limitations did not begin to run against an action for a libelous publication made in a judicial proceeding until after the proceeding had terminated, for the reason that no suit could be brought on such libel until the termination of the suit in which such libelous language was used. After announcing in that case the well settled law that actions for malicious prosecutions could not be instituted until such prosecutions were ended, and after

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calling attention to the analogies between actions for damages for malicious prosecutions and actions for damages for libelous words published in judicial proceedings, it was said:

“Without further consideration of analogies which appear to us to be so close as to lose their character of analogies and become identical, we conclude that every reason which has been advanced or which we can perceive for holding that a cause of action for malicious prosecution does not exist until the malicious prosecution is terminated in favor of the defendant, applies with equal force to a suit by the defendant for libel founded on publications made in the course of the judicial proceeding in the first suit.”

But, it is said by counsel for plaintiffs, that the statute of limitations would begin to run from the time the publication was made; and other reasons are insisted on why the rule applicable to actions for malicious prosecutions should not apply to the cases at bar. The holding in the Masterson-Brown case, as just pointed out, meets the contention that the statutes of limitations would begin to run; and there is still another reason to which attention is also called in the Masterson-Brown case why the suit for damages for the alleged libel should not be prosecuted at the same time the alleged libelous matter is a part of a pending suit, which reason strengthens the other reasons which are common to actions for malicious prosecutions. The reason referred to is that impertinent and irrelevant matter in a judicial proceeding may, on proper motion made therefor, be stricken out and thereby eliminated from the proceeding. In the Masterson-Brown case it is said:

“If the words were not pertinent and material, they would be stricken out at the cost of the pleader on motion as impertinent and scandalous. If not subject to be thus

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summarily dealt with, because pertinent and material to the issue in the suit, it seems clear that a determination of that suit against the defendant would conclusively establish as to him the existence of probable cause. . . . As already suggested, if the libelous matter was impertinent, the defendant had the right to have it stricken out on motion, and thus obtain judgment in his favor thereon; but the plaintiff would not be heard to say that he should set the statute of limitation running in her favor when she could, on her own motion, have the matter stricken out if she chose to abandon it.

As against this view counsel for plaintiffs rely on language used in Townshend on Slander and Libel (4th Ed.), page 337, where it is said: "In a case where the publication of a proceeding in an action is actionable, the aggrieved party need not wait until the termination of the action in which such proceeding was had to bring his suit."

The only authority cited for this proposition is *Hodges v. Hochelaga*, 7 Legal News, 353 (Quebec), a case which, on investigation, we find supports the proposition; but we hardly think a Tennessee Court should follow it in the face of the contrary holding to which we have referred and from which we have quoted. The Canadian report is in French, which, we take it, indicates that it could not be considered an English authority, and the opinion itself, instead of going into the question at length and discussing it as is done in the case of *Masterson v. Brown*, *supra*, to the contrary does but little more than announce the legal proposition. Further, we find the case of *Moody v. Libbey*, 1 Abb. & N. Cas. (N. Y.), 154, cited in 25 Cyc., 432, as holding with the case of *Masterson v. Brown*, but we have not had access to this New York authority. We prefer following the Federal case with which the New York case appears to be in line, and which is supported by sub-

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stantial reasons, rather than following the Canada case, which we do not consider authority of as high a character in Tennessee as the others, and which does no more than merely announce the legal propositions.

The judgments of the lower Court are affirmed, and each plaintiff in error is taxed with the costs of his suit.

BEN ELLIOTT v. MRS. L. BATTLE.

1. **ESTRAY.** *Right of owner upon finding to bring replevin for. Delay of ten days without prepayment of keep.*

The owner of an estray may upon finding his animal in possession of a taker-up bring replevin after wrongful refusal of the taker-up to deliver; and he is not bound to wait ten days, nor is he required to prepay or tender the charges for the animal's keep if the taker-up is arbitrary or unreasonable in his claim of expenses.

2. **SAME.** *Lien of taker-up for keep.*

The taker-up of an estray is entitled to his reasonable expenses and they constitute a lien upon the animal, but this lien cannot be asserted against the demand of the owner for possession until fixed by agreement or until appraised as provided by statute in case of disagreement.

3. **SAME.** *Loss of lien. Refusal to treat.*

A taker-up who refuses to treat with the owner as to his expenses and delays having an appraisement until action of replevin is brought loses his lien.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. T. J. McMorrough, Special Judge.

Elliott v. Battle.

W. S. NOBLE for Plaintiff in Error.

THEO. PARKER for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

UPON the trial of this case in the Court below by Special Judge T. J. McMorrough without the intervention of a jury, the following statement of facts was found and filed by him at the request of the litigants:

"The plaintiff (Mrs. Battle) is the owner of a mare which got away on the Gallatin pike. The animal was lost on Friday, December 20, 1912. The mare wandered to defendant's house, about one-half mile from the pike, in the general direction of plaintiff's house, and wandered into defendant's field and was taken up as an estray on December 21, 1912, about ten o'clock A.M., and he held her as an estray until she was replevined from him on December 31, 1912, at five o'clock P.M. Defendant fed the mare and gave her treatment (the mare had been injured in an automobile accident the day she escaped), for which he claims \$7.00 compensation; but the plaintiff offered to pay \$4.00. The defendant took no steps as directed by statute. Jim Chism, who had the mare hired and was using her on the day she escaped, learned of her whereabouts on December 25, 1912, and went to see the defendant to get the mare, and after some efforts at compromise, he failed to get her, and on December 31, 1912, the plaintiff, the owner, brought this suit as stated. Defendant insists that under these facts, the suit was premature, and also that it cannot be maintained without payment of just compensation, and the plaintiff insists that defendant is not entitled to possession because he did not comply with the statute."

The learned Special Judge was of opinion that Mrs. Battle was entitled to possession of the horse, and sus-

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tained her replevin suit. Elliott excepted and is prosecuting this appeal. These findings of fact are not as full as they could be, but this is owing wholly to the failure of counsel, for the statement contains or is but a repetition of the agreed statement of facts. From it it is best that we deduce that which clearly appears or is inferable.

Mrs. Battle is the owner of the mare in question. The mare escaped and became an estray and was taken up by the defendant. We shall presume that the defendant was a householder, so as to come within the purview of the estray statutes. He fed and attended to the animal for several days. About six days after the animal got into his enclosures the agent and bailee of the owner appeared and demanded the return of the animal. Elliott claimed \$7.00 for feed and keep. The bailee and agent offered \$4.00. They disagreed and suit was brought without tender of any amount by the owner. We are unable to determine the exact amount to which Elliott was entitled, but shall assume that six or seven dollars was not too much for her keep for ten days. Mrs. Battle, however, thought the charges unreasonable. Elliott made no effort to advertise the mare.

These facts call for a construction of our estray laws. There is nothing in the contention of learned counsel for Elliott that this suit was premature because instituted before the expiration of ten days. The real owner of an estray may bring replevin at any time after he discovers where his animal is. But we shall pretermitt for the present the conditions precedent to his right to sue.

It is provided by section 2763 of Shannon's Code that the taker-up of a stray shall within ten days have the animal viewed and appraised by two freeholders or householders and have the certificate of appraisal signed. By sections 2764 and 2765 it is provided that the taker-up

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shall within fifteen days after appraisement deposit a fee of one dollar with the ranger, and by 2767 and 2768 it is further provided that if the owner does not appear and claim the animal, the ranger shall advertise in a newspaper the taking up of the estray, together with a description of the animal. Section 2770 directs that the owner may at any time within twelve months appear and demand the stray by paying the ranger's charges and the expenses of the taker-up, the latter to be ascertained by the judgment of three freeholders to be appointed by a justice of the peace. These charges are thence made a virtual lien upon the stray.

A taker-up who has delayed appraisement and advertisement until the very last moment of the ten days in which to do these things, and who refuses to procure an estimate of his expenses cannot assert a lien upon the estray so as to defeat the demand of the owner for possession.

We have no decisions bearing directly upon this point, but there are two cases which may be referred to as supporting the proposition that until the taker-up has proceeded to appraise or to advertise as required by estray laws, he has no special property in or lien upon the estray; and this regardless of the question as to whether the ten days had expired. *Duncan v. Starr*, 9 Lea, 238; *Cain v. Kelly*, 4 Hump., 474. The rule at the common law was and is that the finder of lost property has no lien upon the lost article or animal for its keep, and cannot resist the action of the owner to recover possession. *Wood v. Pearson*, 45 Mich., 313. The assertion of a claim so at variance with the common law must be based upon a statute expressly or clearly implying that this may be done. Reference must, therefore, be had to the estray statutes of our State. From these it is apparent that the expenses of the

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taker-up do not become a charge or lien until they shall have been ascertained in a certain way. The taker-up cannot arbitrarily assert his right to a particular sum and oppose the right of the owner to claim possession. If he intends to collect charges he must pursue the statute in case the owner and he cannot agree. *Mills v. Fortune*, 14 N. D., 460. He can recover these expenses or retain possession only upon showing that he has had an appraisal and an ascertainment of these charges as prescribed by the statutes; *idem*. He loses his right to a lien if he obstinately refuses to treat with the owner about charges or if he neglects to pursue the statute. *Heinke v. Helm*, 96 Neb., 746.

A party asserting the right to retain possession of an estray as against the owner has the burden of showing that he is entitled to assert possession. *Mills v. Fortune*, *supra*. There is no law justifying him in asserting his claim for keep at an arbitrary sum; section 2770 points out a way in which this can be ascertained, and this section in our opinion has application to a situation arising before the expiration of the ten-day limit. The decisions of other States which we have examined hold that the taker-up must, within a reasonable time, proceed to have an appraisal and to make advertisement; and in the *Mills-Fortune* case, *supra*, it is said that it was his duty to proceed in this manner with reasonable dispatch.

It was shown in this case that the owner or agent tendered \$4.00 on the fourth day after the mare was taken up. Presumptively this was about reasonable. The taker-up should have either accepted this \$4.00 or have resorted to the statutory method of making an estimate; or else he should have agreed with the owner upon some method of computing expenses.

The judgment of the lower Court is affirmed.

Bowers, Winsett v. Henning.

MRS. BELLE BOWERS, BY NEXT FRIEND, W. J. WINSETT,
v. ABE HENNING ET AL.

Writ of certiorari denied by the Supreme Court.

(Nashville. December Term, 1913.)

1. **HUSBAND AND WIFE.** *Deed by conveying wife's realty when she is a minor, voidable.*

A deed by husband and wife, duly executed, conveying the wife's realty when the wife is a minor, is not void but voidable at the election of the wife.

2. **SAME.** *Same. How may be avoided.*

Such deed as that mentioned may be avoided by the wife in either of these ways: (1) By executing a deed to the same lands to a third person after the married woman has attained her majority; (2) by entering on the lands and taking possession and declaring dissent from the deed; (3) by a suit for the lands, and such suit may be brought by next friend.

3. **SAME.** *Same. Wife's right to possession after deed avoided.*

Under statutory modifications of the common law, in Tennessee the wife, on avoiding and setting aside her voidable deed conveying realty, may, in the lifetime of her husband, repossess herself of the realty.

4. **SAME.** *Same. Wife's right to rents and profits on avoiding deed.*

On avoiding such voidable deed as that mentioned the wife may require her vendee to account for rents and profits accruing only from the date of bringing suit to avoid the deed.

5. **SAME.** *Same. Vendee's right to enhanced value by permanent improvements and to purchase money paid to the married woman vendor, and to taxes paid by him.*

The vendee of the married woman who avoids her deed to realty because an infant when it was made is entitled to be reimbursed the amount to which the improvements put on the lands have enhanced its value, counting the value as of

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the date the lands are surrendered to her, and entitled to the purchase money paid to her or which she got the direct benefit of, and to taxes he has paid, but not to purchase money paid to the husband, though the wife may have indirectly gotten some benefit from it; and to secure repayment of these matters he is entitled to a lien on the realty.

6. **SAME. Same. Same. Whether vendee's right can be asserted without cross bill.**

It appears the vendee's rights, as stated in the last preceding division of this syllabus, may be declared in the absence of a cross bill or other pleading by him, yet it is best for him to seek by proper averments and prayer affirmative relief.

FROM DAVIDSON COUNTY.

Appeal from the Chancery Court of Davidson County.
JOHN ALLISON, Chancellor.

JNO. P. ATKINSON for Complainants.

PARKS & BELL for Defendants.

MR. JUSTICE HUGHES delivered the opinion of the Court.

MRS. BELLE BOWERS, a married woman, suing by W. J. Winsett as her next friend, filed the original bill in this cause in the Chancery Court of Davidson County, seeking to have a deed which she and her husband had executed to defendant Abe Henning declared void on the ground that she was a minor at the time it was executed, she being then both a married woman and a minor; and asking that the claims of Henning under the deed be declared a cloud on her title and removed therefrom; and asking a decree for rents and profits during the time the

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property was in the possession of the vendee; and seeking a reference to ascertain the value of such rents and profits. The bill also makes the husband of complainant a party defendant. The vendee, Abe Henning, filed an answer denying all material allegations of the bill except that the property in question had been conveyed to him by complainant and her husband. It is admitted in the answer, however, that the legal title to the property was in Mrs. Bowers at the time she and her husband made the conveyance to defendant Henning, but it is pleaded that the purchase of the property at the time the legal title was acquired by Mrs. Bowers had been made by the husband, and that such part of the consideration as was then paid was paid by the husband; and it is further set out and pleaded that certain notes which had been given for that part of the purchase price not paid in cash had been signed by both husband and wife, and that certain improvements which had been made on the property while the legal title was vested in Mrs. Bowers were placed there by the husband; and it is pleaded that, while the legal title was in the wife, the husband was to all intents and purposes the owner of the lands. It is further pleaded that if the complainant was a minor at the time of her conveyance to defendant Henning that fact was intentionally and fraudulently concealed from him by both husband and wife, and that in addition thereto she was held out as legally competent to convey, all of which it is said in the answer was done for the purpose of defrauding the vendee. It is further pleaded that the wife had, preceding the time of the conveyance to Henning, joined her husband in making other conveyances, and that at the time of the conveyance in question the husband was acting as a real estate dealer, and that he acted in the matter of making the sale to defendant as the agent of his wife. Defendant Henning

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also pleads that at the time he purchased the property in question there were outstanding against it purchase money notes which had been executed by complainant and her husband to the amount of \$430, and that he assumed and paid these purchase money notes as a part of the consideration for the purchase made by him; and he also pleaded that there was a mortgage on the property at the time he bought of \$200, which had been executed by complainant and her husband, and that this had been paid by him as part of the consideration for the property, and that the balance of the consideration (total amount to be paid by him being \$1,800), was paid to the husband as the agent of the wife, and he says that the wife got the benefit of this in the purchase of other property. He also pleaded that he had made certain improvements on the property after his purchase, which he says had enhanced the value of the property from \$1,800, the amount he paid for it, to \$3,000; and while he does not file his answer as a cross-bill, or otherwise seek affirmative relief, it is the insistence of his counsel that if the conveyance to him should be held void at the election of complainant she should be required to restore to him the purchase money and the value of the improvements put on the property.

The case was heard before the Chancellor on the pleadings and evidence offered on behalf of both parties, and the bill was dismissed. Complainant appealed to this Court and has here assigned the action of the Chancellor in dismissing the bill as error.

The facts are that in 1906 the Realty Savings Bank & Trust Co. of Nashville conveyed to Mrs. Bowers as a part of her general estate a certain triangular piece of land, being a portion of a city block situated in the city of Nashville, the consideration for which was the sum of \$29 paid in cash and eighty-six notes for \$5 each, signed by both

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Mrs. Bowers and her husband, one note being payable each successive month thereafter for eighty-six months; but none of the notes had been paid, when, on January 22, 1907, complainant and her husband joined in a deed showing due and proper acknowledgment, and containing the usual covenants, conveying a part of this property, on which certain buildings and structures had been erected after the conveyance to Mrs. Bowers, to the defendant Abe Henning for the sum of \$1,800. At the time of the conveyance to Henning there was a mortgage on the property securing \$200, which had been executed by complainant and her husband after the conveyance to complainant. Henning, the purchaser, paid off the purchase money notes outstanding against the property, for the security of which a lien had been retained in the deed to Mrs. Bowers. These notes, with interest on them at the time of the sale to Henning, amounted to \$444.76. He also paid off the \$200 indebtedness, to secure which the property had been mortgaged, and paid the balance of the consideration of \$1,800 to the husband by check. The \$200, to secure which the property had been mortgaged, had been borrowed by the husband, and the wife had gotten no benefit therefrom. The amount paid to the husband was used by him, and the wife got no part of or direct benefit from it.

As to the \$29 which had been paid on the property at the time it was deeded to Mrs. Bowers, both she and her husband swear it was her property. They also both swear that the structures which had been erected on the property, and were there when it was deeded to Henning, had been placed there out of her means, some of which, according to their testimony, she had made by keeping boarders and selling groceries, and some had been given to her by her husband; and we find no evidence of fraud in connection with the purchase of this property in the name

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of the wife, or in the making of improvements on it. So far as the evidence shows, no creditor of the husband was affected by his giving to her any money that may have gone into the property either as part of the payment of \$29 paid on it when deeded to Mrs. Bowers, or in the placing of the improvements thereon. Nor do we find any evidence of fraud in connection with the failure to disclose the age of the wife to Mr. Henning at the time of the sale to him. While it is established as a fact that she was then not quite eighteen years old, the record convinces us that neither husband nor wife at that time thought that a material circumstance, they both being under the impression that a married woman could convey her real estate by her husband joining her, regardless of her age. Nor do we think the fact that the husband negotiated the trade with Henning at all material. The undisputed fact is that on the 19th of January the proposition to purchase was made by Mr. Henning in which it was shown that the property was the property of Mrs. Belle Bowers, a married woman, and that the proposition was the same day accepted by the husband, F. E. Bowers, while the deed was not executed until January 22d, or three days thereafter, and during this three days Mr. Henning is not shown to have made any inquiry, or effort whatever, to ascertain the age of Mrs. Bowers, or whether she for any reason was incapacitated to make a deed. Further, according to his own testimony, negotiations had been pending for something like a month, and during all this time he had never so much as inquired who the owner was. Nor do we regard it as material that Mrs. Bowers had joined her husband in the execution of other deeds or other transaction in regard to real estate before the execution of the deed to Henning. Another fact entering into a consideration and disposition of the case is that Henning

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tore away some of the improvements that had been placed on the lot while owned by Mrs. Bowers and put other improvements thereon. The case presented is simply one of a minor who was at the time also a married woman joining with her husband in making a conveyance of real estate, title to which was in her, to a purchaser who paid part of the consideration in discharge of the purchase money which she had contracted to pay when she purchased and which was a lien on the land at the time, and a part to the husband, and who thereafter further improved the property after removing some improvements there when he purchased.

The first question arising on this state of facts is the right of Mrs. Bowers to maintain this suit.

In the case of *Wheaton v. East*, 5 Yearg., 41, decided in 1833, the question of the right of one, who, while an infant, has executed a deed for a valuable consideration, to avoid it, was considered; and it was there held that such deed is not void but voidable, and might, at the election of the vendor on arriving at his majority, be avoided; and this holding has been often approved by our Supreme Court since then. Some of the cases approving it are cases where the conveyances were made by husbands and their wives where the wives were at the time minors. *Scott v. Buchanan*, 11 Humph., 467; *Matherson v. Davis*, 2 Cold., 443; *Dodd v. Benthall*, 4 Heisk., 601; *Bradshaw v. Van-Velkenburg*, 13 Pickle, 316, are cases of this character. These cases settle the doctrine as it is expressed in the case of *Scott v. Buchanan*, that such deed is not void but is "effectual to pass and vest in the vendee, a title in fee to the land, according to the terms and purport of the deed; subject, however, to be avoided at the election of the infant, after the removal of her disability." In fact, the law is so well settled to this effect that it is deemed un-

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necessary to make further quotations or cite further authorities. And, as further pointed out in the case of *Scott v. Buchanan, supra*, the infant may disaffirm after arriving at age by either of three methods: First, by executing a deed to a third person for the same lands after the infant has come of age; second, by making an entry on the land, reclaiming it and declaring her dissent to the deed; and, third, by suit for the land. The complainant in the case at bar has elected to pursue the course of bringing suit, suing by next friend as she had the right to do under the holdings in *Coleman v. Satterfield*, 2 Head, 259; *McCallum c. Petigrew*, 10 Heisk., 394; *Key v. Snow*, 6 Pickle, 663, and other cases; and under all of our holdings we think it clear she has the absolute right to avoid her deed, and that the Chancellor was wrong in decreeing otherwise.

Two other questions arising, which we will now consider, are: First, whether the wife can regain possession of the lands during the life time of her husband, or whether her suit can be maintained only for the purpose of removing the claim of her vendee as a cloud on her title, the purchaser to be left in possession during the life of the husband; and, second, to what extent, if at all, she can, if entitled to the possession, hold her vendee liable for rents and profits during the time he has been in possession under the deed to him.

As to the right of the wife to regain possession, we have a statute found in Shannon's Code, section 4234, which is controlling. This statute was passed at the session of our Legislature held in 1849-50, and, as brought forward in Shannon's Code, is as follows:

"The interest of the husband in the real estate of his wife, acquired by her, either before or after marriage, by gift, devise, descent, or in any other mode, shall not be sold or disposed of by virtue of any judgment, decree, or

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execution against him; nor shall the husband and wife be ejected from or dispossessed of such real estate of the wife by virtue of any such judgment, sentence, or decree; nor shall the husband sell his wife's real estate during her life without her joining in the conveyance in the manner prescribed by law in which married women shall convey lands."

In the case of *Coleman v. Satterfield*, 2 Head, 259, it is said:

"It is true, that, by the common law, the husband, by marriage, gains an estate of freehold in the lands of his wife, in her right, which continues at least during their joint lives, and may possibly last during his own life. And this interest he may, by his own deed, convey to another, and the conveyance will operate to vest the purchaser with the husband's estate; or the husband may voluntarily suffer a disseizin, or acquiesce in a wrongful ouster of possession; and in neither case can the wife, separately, take any step at law or in equity to regain the possession; she is without a remedy, by the common law, so long as the coverture lasts. But, still, her ultimate fee simple interest is not affected during her disability, and on its termination, she will be remitted to her right of action to recover the possession.

"But though the husband, by his own act, may defeat the wife's enjoyment of the possession and profits of her land, by the principles of the common law, yet he has no power over her title or interest in fee; of this she can only be divested of her own voluntary act, in the form prescribed by law. And the attempt to deprive her of it by fraud or force, either on the part of her husband, or a stranger, furnishes her a clear ground for redress in equity, where a married woman may sue separately.

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"In this view, upon general principles, the bill might well be sustained so far, at least, as it seeks to have the deed set aside. But under the Act of 1849-1850, her right to relief is perhaps broader and more ample. By that Act, the common law is materially changed. It not only protects the husband's interest in the lands of his wife from seizure and sale by his creditors, during her life, but it likewise disables the husband to sell or dispose of such interest, by his own act, during the wife's lifetime, without her joining in the conveyance. By the necessary construction of this Act, the wife cannot be deprived either of the title, or possession of her lands, except by her own voluntary act. And if a conveyance has been procured from her by fraud or other improper means, whether by husband or by a stranger, she may maintain a bill to have it set aside, and to have possession restored to her—making the husband a party defendant."

In *McCallum v. Petigrew*, 10 Heisk., 394, our Supreme Court, in referring to the statute which has just been set out, says, "we think by a fair construction of the Act of 1849-1850, and by giving effect to its spirit and intent, which is, that the wife shall not by the act of her husband be deprived of the possession of her land, it secures to her when necessary the right to prosecute by next friend a separate action to recover her possession. . . . The object of the Act of 1849-1850 was to protect the possession of the wife against the acts of her husband, and whenever he has executed his deed for the land, whether he would be estopped by it from joining in the prosecution of an action to recover the land or not, this Act gives to the wife a right, independent of and against the act of her husband, to be restored to the possession of her land."

The holding in the Coleman-Satterfield case, it can be also said in this connection, met the express approval of

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our Supreme Court in the later case of *Garth v. Fort*, 15 Lea, 683; and in the still later case of *Key v. Snow*, 6 Pickle, 663, that Court again approved the holding in the Coleman-Satterfield case, quoted at length from it; and also the holding in the McCallum-Petigrew case announcing that "the Act of 1849-1850 was intended to secure to the wife the use and enjoyment of the estate during her life."

True, there are some cases, as those of *Dodd v. Benthall*, already herein referred to, and *Aiken v. Suttle*, 4 Lea, 103, where the wife was denied the right of possession during the life of the husband, although her deed was adjudged voidable; but in these cases the deeds had been made before the passage of the Act of 1849-1850, giving to the wife the right of possession, notwithstanding the husband's conveyance, while in the cases holding that she can gain possession during the life of the husband the deeds were executed since the passing of that statute. There is, therefore, no conflict between the two lines of holdings; and we think it settled beyond question that Mrs. Bowers is entitled to the possession of the lands conveyed to defendant Henning, and that such possession must be restored to her.

As to her right to make her vendee account for the rents and profits, while the holdings do not appear uniform, we think the law is now well settled. In the case of *McCallum v. Petigrew*, *supra*, where the deed of the wife was voidable for lack of proper privy examination, and where the wife elected to avoid it, it was held that the wife was entitled to the rents and profits only from the date of the filing of her bill. The cases of *Lucas v. Rickerich*, 1 Lea, 726, and *Garth v. Fort*, 15 Lea, 683, bear out this holding to the extent that they deny the right of the wife to require an accounting for rents and profits which accrued before the filing of her bill. In those cases the wife was

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denied rents which had accrued before the assertion of her rights thereto. We, therefore, think it clear that complainant cannot require an accounting for rents in the case at bar except such as have accrued since the filing of her bill, but that she is entitled to such accounting since that date.

As to the right of the defendant to the enhanced value of the land resulting from the improvements made thereon, which is insisted on by his counsel, under all the authorities he would have this right to the extent that he could set-off the rents and profits with which he would be chargeable, under the rule we have already announced, against such enhanced value; and under some of our older holdings, particularly *Jones v. Perry*, 10 Yerg., 59; *McKinley v. Holiday*, 10 Yerg., 477, and a dictum in *Aiken v. Suttle*, 4 Lea, 103, 122, based on these and other older holdings, this would be the extent to which he could be reimbursed for such improvements or enhanced value. However, as we will show, under our more recent holdings, he is entitled to be reimbursed the full amount of enhancement in value resulting from his improvements; and in the same connection it can be stated that he is entitled to be reimbursed the amount of the purchase money paid to complainant, or directly for her use and benefit, which means that he is entitled to be reimbursed the \$444.76 paid in discharge of complainant's notes given in part payment of the lands when purchased by her, with interest thereon. But defendant is not entitled to be reimbursed by complainant or out of her property any money paid to the husband of complainant or for his use and benefit, as we will hereafter show.

In *Herring v. Pollard*, 4 Hump., 362, our Supreme Court, following the holding of Justice Story in *Brights v. Boyd*, 1 Story, 478, departed from what had been the

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previous holdings, and held that a vendee at a parol sale of lands, where the vendor elected to avoid the sale, was entitled to such improvements to the full extent that they had enhanced the value of the lands. This was held to be the rule in a Court of Equity, but in the later case of *Mathews v. Davis*, 6 Hump., 324, the rule was denied in a Court of Law. Then in the still later case of *Humphreys v. Holtsinger*, 3 Sneed, 227, the vendee at a voidable sale was again allowed in a Court of Equity the value of improvements to the full extent to which they had enhanced the value of the lands, although in that case they appeared to exceed the rents, as rents and profits were directed to be deducted; and a lien was there declared for the balance representing such enhanced value. Then in the still later case of *Rhea v. Allison*, 3 Head, 177, it was said:

"It is settled, in this State, that where a man is put in the possession of land by the owner, upon an invalid or verbal sale, which the owner fails or refuses to complete, and in the expectation of the performance of the contract, makes improvements, a Court of Equity will directly and actively, upon a bill filed by him against the owner for an account, make him compensation to the full value of all his improvements, to the extent they have enhanced the value of the land, deducting rents and profits, and will treat the land as subject to a lien therefor. *Herring & Bird v. Pollard's Exrs.*, 4 Humph., 362; *Humphreys v. Holtsinger*, 3 Sneed, 228-230. The same rule must apply to purchase-money paid upon the faith of the contract." This rule announced in the *Rhea-Allison* case was approved in the case of *Rainer v. Huddleston*, 4 Heisk., 223, but held to not be applicable there because the contract of sale had not been carried out on account of fault or failure of the vendee. The rule laid down in the *Rhea-Allison*

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case was then again applied in the case of *Masson v. Swan*, 6 Heisk., 450, where the vendee elected to rescind a verbal sale for the reason it was voidable. In this last case it was said of the right of the vendee to such reimbursement that "The equity springs from the fact that the contract is not void but voidable, and that either party has the right to avoid it." This last case also goes to the point of holding that the vendee at such voidable sale on electing to rescind it is entitled to be reimbursed the taxes paid while holding and in possession of the land. The case of *Treece v. Treece*, 5 Lea, 225, announces and applies the same rule as to reimbursement for the full amount of the enhanced value, and for taxes paid by the vendee.

It is also settled by a number of holdings that the right to such reimbursement attaches to the lands even as against an infant or a married woman. In *Pilcher v. Smith*, 2 Head, 209, it was held that on rescission of a voidable contract of sale of realty at the instance of a married woman, the Court will order the repayment of the purchase money and declare a lien on the land to secure its payment, for the reason, as there pointed out, that it would be a fraud to permit a rescission without enforcing such right; the Court saying that the lien would be declared "upon the principle that such disability cannot be a protection against fraud." In the case of *Caldwell v. Palmer*, 6 Lea, 652, in speaking of a holding in a manuscript opinion at the December term, 1880, of our Supreme Court, it was said that an infant had, in that case, brought ejectment for land which had been sold under proceedings in the County Court, and that, on his being permitted to recover, a sub-vendee was subrogated to the rights of the purchaser at the Court sale to the extent of having the benefit of that part of the purchase money which had been actually paid out and used for the

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benefit of the infant. See also *Wright v. Dufield*, 2 Baxter, 218.

Now, as the grounds of all these holdings was that the sale was merely voidable—not void, as pointed out in the case of *Masson v. Swan*, 6 Heisk., 455; and as it is settled that the conveyance by the infant wife—the complainant in the instant case, was likewise voidable only and not void; it necessarily follows that the same rule must apply as to her, and that as a condition to her being permitted the relief she seeks, the defendant Henning, her vendee, will be allowed to recover, and a lien will be declared in his favor against the lands, for the amount of the purchase money actually paid to her with its interest, and such amount as the improvements put on the lands by him have enhanced the value of same, the enhancement to be measured as of the date of surrender to her; and the amount of the taxes he has paid on the lands; but he will be allowed only that part of the purchase money paid in discharge of the purchase money notes against the lands at the time he bought them, and not for the part of the purchase money paid directly to the husband, or in discharge of the mortgage, which the evidence shows was to secure money gotten alone for the husband's benefit. Although the wife may have indirectly received some benefits from the payments to the husband, or for his benefit, it is settled in the case of *Bradshaw v. VanVelkenburg*, 13 Pickle, 316, that she cannot be charged therewith.

While it is true the husband does not by cross-bill, or otherwise, seek affirmative relief, under the holdings in *Pilcher v. Smith*, 2 Head, 209; *Hilton v. Duncan*, 1 Cold., 313, 321; *Wright v. Dufield*, 2 Baxter, 218, 222, declaring that the wife will be granted the relief she seeks *only on condition the vendee is accorded his rights and as an incident thereto*, we think this relief can be awarded the

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husband; but under the language of *Bradshaw v. VanVelkenburg*, 13 Pickle, 316, 323, there is some doubt about the vendee's right to this measure of relief without appropriate pleadings therefor, and, as the case must be remanded for an accounting to adjust the matters between the parties as their rights are herein pointed out, we suggest that when the case reaches the lower Court defendant Henning's answer be amended by making proper allegations, and converted into a cross-bill and the proper relief prayed so as to leave no question as to his right to that measure of relief to which he is entitled. This we suggest because to grant the relief to the complainant without at the same time granting the defendant proper relief, as pointed out by our cases hereinbefore referred to, would have the effect of working a fraud against the defendant.

The case is reversed and remanded to the Chancery Court of Davidson County that proper references may be had and the rights of the parties adjusted as set out herein. The defendant will pay the cost of this Court. The costs of the Court below will be paid as may be hereafter adjudged by the Chancellor.

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G. F. BRANSFORD ET AL. V. J. W. BLACK ET AL.

Writ of certiorari denied by the Supreme Court.

(Nashville. December Term, 1913.)

1. DEMURRER. *Construction liberal to declaration.*

In Tennessee, contrary to the rule prevailing at common law, on a demurrer being filed the pleading demurred to will be given a liberal construction, and this is the practice in courts of law as well as in equity.

2. BANKRUPTCY PROCEEDING. *In rem. All interested parties affected.*

A bankruptcy proceeding is one *in rem*, and all parties interested in the *res*, the estate of the bankrupt, including the bankrupt, the trustee and the creditors, secured and unsecured, are regarded as parties thereto.

3. SAME. *Trustee's sale a judicial one, being by the court.*

A sale by a trustee in bankruptcy is a judicial sale as contradistinguished from an execution sale, and the court is the seller, acting through the trustee. The title does not pass till confirmation.

4. SAME. *Jurisdiction of Federal Courts exclusive.*

The bankruptcy law is paramount, and, when properly invoked, the jurisdiction of the Federal bankruptcy court is exclusive in the administration of the affairs of insolvent persons, the state courts having no jurisdiction over them.

5. TRUSTEE IN BANKRUPTCY. *Not liable to suit in state court, when.*

A suit cannot be maintained in a state court against a trustee in bankruptcy for negligently failing and refusing to perform his duty in the matter of conducting a sale in a bankruptcy proceeding, because of which negligence the property was not

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sold at a fair price, for the reason that the act of the bankruptcy court in ratifying or affirming the sale—making it—was the adjudication of that court, and cannot be attacked collaterally in a state court.

FROM DAVIDSON COUNTY.

Appeal from the Circuit Court of Davidson County.
M. H. MEEKS, Judge.

J. T. MILLER for Plaintiffs.

F. M. BASS and AVERY HANDLY for Defendants.

MR. JUSTICE HUGHES delivered the opinion of the Court.

G. F. BRANSFORD and Johnson Beazly brought this suit in the Circuit Court of Davidson County against J. W. Black and W. Lyles Black, and on demurrer to their declaration their suit was dismissed. They appealed to this Court, and complain by their assignments of error at the action of the lower Court in sustaining the demurrer.

Plaintiffs allege in their declaration that McDonald & Madden, merchants of Smith County, Tennessee, filed in the Federal Court of the Middle District of Tennessee, at Nashville, a petition in bankruptcy, and that defendant J. W. Black was first appointed receiver and later trustee of the estate of this mercantile firm, which estate consisted, in part, of a stock of merchandise; that it became the duty of defendant J. W. Black, in his official capacity, to sell said estate going into his hands so as to obtain the highest price and largest sum therefor that could reasonably be had for the benefit of the estate and the creditors

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thereof; that he did sell same, but that he and his co-defendant, W. Lyles Black, who it is alleged was acting as his agent, "neglected, failed and refused to perform" this duty of obtaining the highest price for the stock of merchandise; that they "neglected to sell said stock with reasonable promptness or at such a time as that it would bring a reasonable value, but, on the contrary, negligently delayed to sell and dispose of the same until said stock had greatly depreciated in value; that the defendants knew the result of his (their) said delay and failure to perform their duties in the premises, or could have known the same by the exercise of ordinary care"; and it is then alleged that plaintiffs are creditors of the estate of the bankrupts, and as such have been injured by the "wrongful, unlawful and negligent acts of the defendants as aforesaid," in that the debts of the bankrupt were not paid in full. It is not so expressly stated in the declaration, but clearly it is meant, that plaintiffs were paid part of their claims, but not paid the full amounts thereof. They nowhere state or show the amounts still due them, but seek to recover the sum of \$1,000 alleged to be due them as the result of the wrongs of the defendants; so, giving their declaration a liberal construction, as the practice in Tennessee, contrary to the rule prevailing at common law, requires we should do (*Lincoln v. Purcell*, 2 Head, 143; *French v. Dickey*, 3 Cooper's Chy., 302; *Noll v. Railroad*, 4 Cates, 140; *State v. Standard Oil Co.*, 12 Cates, 86-108)—a practice, the reasons underlying which should apply to actions at law as well as suits in equity—it must be assumed that their claims were unpaid in that amount or more.

The demurrer sets out nine grounds or reasons why this suit cannot be maintained, among which are that the bankruptcy Court had jurisdiction of the selling of the estate of the bankrupts, and in making the sale exercised that

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jurisdiction, and that this suit instituted by plaintiffs is a collateral attack on that bankruptcy proceeding, or an effort to review it before a separate Court or tribunal.

As to the nature, scope and effect of a bankruptcy proceeding, in so far as it is necessary for the present purposes to inquire, we cannot do better than quote from the opinion in the case of *In re Reynolds*, 127 Fed. Reporter, 760. It is there said: "An adjudication of bankruptcy operates *in rem*, and from the moment of the adjudication the bankrupts' estate is under the jurisdiction of the bankruptcy Court, which will not permit any interference with its possession, even though it be by an officer of a State Court acting under its process. Being a proceeding *in rem*, all parties interest in the *res* are regarded as parties thereto, including the bankrupt and trustee, as well as the creditors, secured and unsecured. The adjudication vests in the trustee or temporary receiver the title of the bankrupt's property, and stays all seizures made within four months. An adjudication of bankruptcy has the force and effect of an attachment and injunction. It is a caveat to all the world."

See also 1 Loveland on Bankruptcy, section 29, p. 103, stating the law to the same effect, and citing many other cases in support thereof.

It results that plaintiffs must be treated as having been parties to the bankruptcy proceeding in which the estate of the bankrupts was sold; and in truth, while their declaration does not in so many words so state, it is fairly inferable from it, as already observed, that they were in fact before the Court and received their pro rata of the funds arising from the sale of said estate and distributed among the creditors.

Another proposition applicable here is that, as stated in 2 Remington Bankruptcy, § 1950, page 1215: "A trus-

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tee's sale in bankruptcy is a judicial sale in contradistinction from an execution sale"; and in this connection it must be borne in mind, as there further observed, that "In judicial sales, such as are sales by trustees in bankruptcy, the Court is the real seller and the trustee is the agent to obtain the highest bid—the sale is not consummated nor does title pass until confirmation."

Another proposition pertinent in this connection is that, as stated, in the language of Chief Justice Fuller in *In re Watts and Sachs*, 190 U. S., 1, 47 L. Ed., 933, "The bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

See also 1 Loveland on Bankruptcy, § 31, page 108, where it is said, "The jurisdiction of a Court of bankruptcy is exclusive of all other Courts, so far as questions affecting the possession of administration of the property in *custodia legis* is concerned."

The same principle is embodied in the following taken from 1 Loveland on Bankruptcy, § 42, pages 139 and 140:

"The bankrupt law places the administration of the affairs of insolvents exclusively under the jurisdiction of the bankruptcy Court. In this respect the State Courts do not have concurrent or co-ordinate jurisdiction with the Courts of bankruptcy. . . . Where the possession of the State Courts has the effect of defeating the operation of the bankruptcy law, the Courts of bankruptcy may take property from the custody of the State Courts for the purpose of administering it in accordance with that law. This occurs where property is in the possession of a receiver of a State Court, the appointment of which receiver constituted an act of bankruptcy upon which the adjudication is made, or where the judgment appointing a receiver

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within four months of bankruptcy creates an equitable judicial lien void under section 67f, or where property is in the possession of a sheriff or other officer of a State Court by virtue of an execution on a judgment, or an attachment, void under section 67f, of the Act, or where the State Court has taken possession of specific property for the purpose of enforcing a mortgage or other lien on it, when the lien is invalidated by the bankrupt act.

“In all these cases it will be observed that there is a direct conflict between the jurisdiction sought to be exercised by the State Court, and the power of Congress has conferred upon the bankruptcy Court to administer the estate of the insolvent. For this reason the State Court must yield to the paramount jurisdiction of the Federal Court.”

Other authorities might be cited and quoted to the same effect on all the propositions, but we deem it unnecessary.

Now, bearing in mind that plaintiffs must be regarded as having been parties to the bankruptcy proceeding, and bearing in mind further that the bankruptcy Court had exclusive jurisdiction not only of the estate of the bankrupts but of *its administration*, and that the sale which was made was a sale *by the Court* and not by the trustee, we are of opinion that this suit cannot be maintained, and that the judgment of the lower Court was and is correct. The adjudication of the bankruptcy Court in the matter of affirming or ratifying the sale was the adjudication of a Court of competent jurisdiction, and the attack made on the trustee and his agent in the case at bar is necessarily a collateral attack on the judgment of the bankruptcy Court, and, of course, cannot be maintained. *Slaughter v. Railroad Co.*, 17 Cates, 292.

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As said in 1 Remington on Bankruptcy, section 1788, "Dissatisfied litigants cannot obtain an indirect review of orders made in the proceedings in bankruptcy by instituting plenary action against the trustee."

It must be borne in mind that the declaration contains no charge of corruption or fraud against the trustee in bankruptcy, but only charges him with wrongfully and negligently failing to procure the best price, etc. Without expressly so holding, as such case is not before us, it can be said that if defendants were charged with such acts as would make a case of willful intent to injure plaintiffs, or corruption on the part of defendants resulting in their injury, this suit might be maintained. *Russell v. Phelps*, 42 Mich., 377. But no such case is made.

We have examined the authorities relied on by counsel for plaintiffs in this case, and, without reviewing them, can say that in our opinion they in no sense contradict, or are inconsistent with, those we have already referred to and quoted from. They go merely to the point, when analyzed, first, that when the question of whether the bankrupt had title to property, and therefore whether it became a part of his estate, is involved certain actions may be maintained in the State Courts by claimants of the property rather than by creditors of the bankrupt estate, growing out of such questions; and, second, that under a Federal statute passed in 1888 receivers of properties appointed by and acting under Federal Courts in carrying on business connected with the property may be sued in State Courts where the cause of action originated in any act or transaction by the receiver in *carrying on the business*, such as the receiver of a railroad in operating the road. To illustrate the second class of cases: If, while a receiver appointed by and acting under the orders of a Federal Court, is operating a railroad, an employe, or any

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other person, as to that matter, should sustain personal injuries as a result of such operation, and the injuries were the result of negligent operation, suit to recover for such injuries might be brought in a State Court. Such is the case of *Gobleman v. Railway*, 179 U. S., 335, 45 L. Ed., 220, relied on by plaintiffs. In the course of the opinion in that case it was pointed out that cases involving suits against United States officers as such were not there in point, as that case was controlled by a special statute, and it was there further pointed out that any judgment which might be obtained in a State Court would have to be paid out of the property or funds in the Federal Court. So it is seen that that class of cases can have no application here. They are in no sense attacks on judgments of bankruptcy Courts as is the action at bar.

The judgment of the trial Court in sustaining the demurrer was and is correct, and it is affirmed, with costs.

W. H. SCARBOROUGH ET AL. V. J. T. FORD ET AL.

Writ of certiorari denied by the Supreme Court.

(*Nashville*. December Term, 1913.)

HUSBAND AND WIFE. *Conversion of wife's personalty by husband a matter of intention.*

The reduction of the wife's personalty to the husband's possession so as to make it his is a question of intention on the part of the husband, and where notes, the proceeds of the wife's realty, are made payable to the husband by mistake

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of the draftsman, and the husband takes manual possession of them without meaning to convert to his own use, but still regarding them as the wife's, they do not become his property, but are the wife's.

FROM STEWART COUNTY.

Appeal from the Chancery Court of Stewart County.
J. W. STOUT, Chancellor.

LEWIS & STOUT for Complainants.

DUNLAP & FITZHUGH for Defendants.

MR. JUSTICE HUGHES delivered the opinion of the Court.

W. H. SCARBOROUGH and others, creditors of J. T. Ford, filed the original bill in this cause against Ford, their debtor, as a general creditors' bill, alleging his insolvency, and seeking to subject to the payment of their claims his assets, especially four promissory notes, each in the sum of \$484.25, executed by P. H. Naylor, and payable to J. T. Ford, on January first of the years 1912, 1913, 1914 and 1915, respectively, alleged to belong to him. By an amendment to the original bill, Mrs. Ford, the wife of defendant J. T. Ford, was made a party. By their answers Mr. and Mrs. Ford pleaded that the notes sought to be reached by complainants were the property of the wife, and therefore not subject to the payment of the debts of the husband. The Chancellor, after adjudging that the husband owed various sums to various creditors, found against the contention of Ford and wife as to the ownership of the notes, holding that they were the

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property of the husband, and ordered them subjected to the payment of the debts of his creditors. From so much of the decree as held against this contention as to the the ownership of the notes Ford and wife appealed to this Court, and have here assigned errors.

It is undisputed that the maker of the notes, P. H. Naylor, bought a tract of land, the title to which was in Mrs. Ford, the land having descended to her from her father; that the price contracted to be paid for the lands was \$2,000; that \$400 of this amount was paid by the conveyance of a house and lot to Mrs. Ford; and that, for the balance of the consideration, the notes in question were executed; and the sole question before this Court, as both sides agree, is whether or not the husband, Mr. Ford, reduced the notes to his possession so as to make them his property.

Preliminary to reviewing the evidence on the question involved, we will take our legal bearings.

In *Ex parte Yarborough*, 1 Swan, 202, a husband and wife had been owners as tenants in common of certain realty, various portions of which had, from time to time, been sold off and the proceeds applied in payment of the husband's debts and to his own use. The wife sought by her suit to be reimbursed out of the remaining lands her share of the purchase money which had been used by her husband. In the opinion in that case our Supreme Court, quoting with approval from *Chester v. Greer*, 5 Hump., 26, said:

"If the wife consents to the sale of her real estate, and joins her husband in a conveyance of it made according to the forms of law without an understanding or agreement that the proceeds are to be held or vested for her use, or that she is to be remunerated out of the estate of her husband, all her interest in the estate is gone, and the hus-

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band holds the consideration for which it was sold in his own absolute right, discharged from any claim of hers paramount to his"; and following this language this further observation is made: "There can be no question in the case before us as to the wife's right, had there been any agreement or understanding between her and her husband that compensation should be made, or that he should be regarded as her debtor for the proceeds of her proportion of the land sold and conveyed by them. The sole difficulty is that no such contract or agreement ever existed—none such is pretended to have been made. The question is as to the intention of the parties at the time of the transaction."

This declaration of the law in the Yarborough case is approved in *Pritchard v. Wallace*, 4 Sneed, 405. That case, while brought to set up and establish a resulting trust, declares that where there is no agreement of the husband to reinvest the proceeds of the wife's realty in other lands for her benefit the proceeds do not become his, although he reinvests and takes title in his own name. Speaking of such situation the Court there said further: "The money was hers (the wife's) by virtue of his (the husband's) agreement and the title was made to him. She is in equity the owner, and he held the legal title in trust for her."

See also *McMillan v. Mason*, 5 Cold., 263; *Cox v. Scott*, 9 Bax., 309; *Hardison v. Billington*, 14 Lea, 349-50.

The expressions of our Supreme Court just set out and in the other cases referred to are but in keeping with the holdings of the Courts generally. In 21 Cyc., 1181-1183, the following propositions, in support of which many cases from many jurisdictions are cited, are announced as the law:

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"The reduction to possession by the husband must be with the intention of converting them to his own use. Mere reduction to possession without intent to make them his own is not sufficient. Both elements, the reduction and the intention, must exist. . . . Reduction to possession by the husband, in absence of circumstances showing a different intention, is *prima facie* evidence of conversion to his own use. Likewise, the mere possession by the husband is not sufficient. Possession, or reduction to possession, must be coupled with the rights of a husband. Where the husband holds possession as agent, trustee, bailee, executor, or in any other relation than that of husband, intending to hold the property not for himself but for his wife, such possession does not vest ownership in him."

It appears then that the controlling question in the case at bar necessarily is one of the intention of the husband as to reducing the notes to his possession. The facts bearing on the question of intention as disclosed by the evidence are these: One R. E. Thomas, a justice of the peace, drew the deed conveying the lands to Mr. Naylor, and also the notes executed by Naylor representing the larger part of the purchase money. Mr. Ford, who had the notes and deeds drawn in the absence of his wife, swears that he did not mean to reduce the notes to his possession, but meant for them to be and remain his wife's property, and says that he instructed the justice of the peace to make them payable to his wife, but that when the work of drafting them was about completed it was discovered that they were made payable to the husband, that when this was discovered he called attention to the mistake, and that thereupon the justice of the peace remarked that if he made the change he would have to rewrite the notes, observing further that it made no difference—that

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“it would be just as good in the husband’s name as in the name of the wife”; and he says that, under these representations, the notes were permitted to remain as drafted. Mr. Naylor, the only other person now living who was present at the time the papers were being drawn, swears that he heard Mr. Thomas, the draftsman, ask Mr. Ford if he wanted the notes made payable to his wife, and that his best recollection is that the reply of the husband was that he wanted them so made. On cross-examination, Mr. Naylor says that he is pretty sure that he heard that statement made. The justice of the peace died before the proof was taken in this case, and the testimony of these two witnesses, Mr. Ford and Mr. Naylor, is all the testimony on this question. From it and from all the circumstances we think, and find as a fact, that Mr. Ford directed the notes drawn payable to his wife, and that it was the mistake of the draftsman that they were not so drawn; and we think and find further that Mr. Ford took manual possession of the notes after drawn and signed payable to his wife under the representation and belief that they were as effectual in vesting title in the wife as if drawn payable to her.

The decree of the Chancellor is reversed in so far as it holds that the notes in question had been reduced to the husband’s possession and were his; and, it appearing that the rights of creditors to other property are yet to be worked out in the Court below, the case is remanded to be further proceeded with. Complainants will be taxed with the costs incident to this appeal. The costs below will be taxed as may hereafter be adjudged by the Chancellor.

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DORA SMITH V. CHAS. SALVAGGIO BY NEXT FRIEND.

Writ of certiorari dismissed by the Supreme Court.

(*Jackson*. April Term, 1914.)

1. PARENT AND CHILD. *Negligence of parent in giving or allowing minor child to handle dangerous weapon.*

A parent who gives to or permits a very young minor child to handle a dangerous weapon or instrumentality—*e. g.*, a gun—in such way and at such times and places as are calculated to imperil the lives or limbs of others, is liable for injuries sustained or occasioned by the careless or reckless handling of the instrumentality by the infant.

2. ASSIGNMENTS OF ERROR. *Failure of the Judge to weigh the evidence on motion for new trial.*

There must be a specific assignment in this Court of the failure of the trial Judge to weigh the evidence upon motion for a new trial.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County. Part 3. A. B. PITMAN, Judge.

RALPH DAVIS for Plaintiff in Error.

ANDERSON & CRABTREE, for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS action was instituted by the defendant in error, Charles Salvaggio, by his next friend, Joe Salvaggio, against the plaintiff in error, Dora Smith, in the Circuit

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Court of Shelby County, to recover of her damages growing out of injuries inflicted upon him by the son of the plaintiff in error, who was a minor of tender years.

There was a verdict in the Court below, where the case was tried before the Court and a jury, in favor of the defendant in error for \$800, from which the plaintiff in error appealed to this Court, after her motion for a new trial had been overruled.

The declaration alleged that the plaintiff in error's son was a minor of very tender years, and that some time prior to the injury inflicted upon the defendant in error, which was on January 16, 1911, plaintiff in error purchased, or permitted to be purchased, by or for her said son, and to remain in his possession and control, and in the possession and control of one Ernest Nelms, also a boy of tender years, and a playmate of the plaintiff in error's son, a certain .22-calibre rifle; and that on or about the 16th day of January, 1911, and for sometime prior thereto, with the knowledge, consent and permission of the plaintiff in error, said boys were shooting the said rifle in and around their homes and the home of the defendant in error on Rayburn avenue, in the city of Memphis, which avenue is and was one of the most generally used thoroughfares in the city of Memphis, when the said boys either negligently or accidentally, or on purpose, shot the defendant in error in the back and side, seriously and permanently injuring him.

That the defendant in error was upon the premises surrounding his home at the time of the shooting, and that said shooting was wholly without fault upon his part; that the plaintiff in error was guilty of negligence, in, that she put, or caused to be put, in the hands of said boys, or allowed and permitted said rifle, a dangerous instrument, to be used by said boys of tender years, both of whom

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were inexperienced in the use of such an instrument, and lacked the proper discretion necessary for the handling of the same, which fact was well known to the plaintiff in error.

The plaintiff in error filed a plea of not guilty.

There is evidence tending to show that the plaintiff in error was running a public resort on Rayburn avenue, in the city of Memphis; that she had been married, but was divorced from her husband, and had one child—a son, who was about nine years of age at the time of the injury to the defendant in error; that this son did not stay at the home of the plaintiff in error, but stayed at the home of Luella Williams, who lived about a half block from the plaintiff in error. The reason for the son staying at the home of Luella Williams was on account of the character of house kept by the plaintiff in error. The plaintiff in error paid Luella Williams \$5 per week for keeping her son at her home, though the proof shows the son was at the home of the plaintiff in error daily, and sometimes several times per day; but remained at the home of the Williams woman at night.

There was also evidence offered by the plaintiff below tending to show that sometime prior to his injuries, the plaintiff in error's son had secured, in some way, a gun—a rifle of .22-calibre, and had been shooting said rifle around the premises of the plaintiff in error, which was only two doors from where the defendant in error lived, and had also been shooting on the street in the vicinity of his home, and the plaintiff in error's home.

One witness testified that he had seen the boy coming out of the plaintiff in error's house with said rifle, and there is other evidence in the record tending to show that he was seen on several occasions about the plaintiff in error's home shooting the rifle at birds and targets.

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On the 16th day of January, 1911, while the plaintiff below was standing upon his premises, he says that the plaintiff in error's son and a companion was shooting the rifle near him, and that the plaintiff in error's son said to his companion, "I want to kill a dago," and took the rifle out of his companion's hand and fired upon the defendant in error, shooting him through the body, the ball entering his side passing clear through the body. There is evidence tending to show that the defendant in error suffered great pain and mental anguish from the wound inflicted, and was confined in the hospital for about a month from the injury.

The plaintiff in error testified that she did not know of her son having the gun in question; that he secured the gun without her knowledge or consent, and did not learn of her son having the gun until she learned of the shooting, which was three days after it occurred.

The boy testified that he purchased the gun at a store on Main street, paying \$1.50 for it, and that he purchased it with money that he had earned in selling newspapers on Sundays. He says he bought the gun on his birthday, and carried it to the home of Luella Williams, where he kept it concealed under the bed. He says he did not shoot the defendant in error, but that Ernest Nelms, his companion, did the shooting.

It is insisted by the first assignment of error that there is no evidence to support the judgment.

We are of opinion that this assignment of error is not well taken. While the plaintiff in error testified that she did not know that her son had the gun, and was in the habit of shooting about her premises and on the street near the defendant in error's home, we think that there are facts and circumstances in the record tending to show that she did, and that the jury was warranted in inferring

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from the facts and circumstances proven that she did know it.

We think it is the well settled law that a parent who permits his or her child to have possession of a deadly weapon when, on account of the child's youth and inexperience, he is incompetent to be intrusted with it, and the parent knows the danger that might happen to others from the use of such weapon, or in the exercise of reasonable care should know it, is liable for injuries inflicted upon others by the child's reckless use of such weapon. In other words, the parent is chargeable with negligence in such cases, if, from all the facts and circumstances, he should have known of the probable danger and injury that might result to others from permitting the child to have the weapon in his possession. *Myers v. McDowell*, 53 L. R. A., 789; Pollock, Torts, page 33; Am. & Eng. Ency. of Law, Vol. 21, 1057, 1058; *Binford v. Johnson*, 82 Ind., 427; *Carter v. Towne*, 98 Mass., 567; 96 Am. Dec., 682; *Hoveron v. Noker*, 50 Am. Rep., 381; *Palmer v. Ivarson*, 117 Ill. App., 535; 29 Cyc., 1666; 22 Am. & Eng. Ann. Cas., 1582.

The rule for such liability upon the part of the parent is not founded upon the relation of parent, but upon the ground of the negligence of the parent in permitting the child to have possession of the dangerous and deadly weapon, when, from his youth and inexperience, it might be reasonably anticipated, that in the use of such weapon the child would inflict injury upon others.

The question of the parent's negligence in such cases is always one for the jury. The question of the defendant's negligence in the case at bar was fairly left to the jury by the Court in the following instruction:

"So, with reference to the particular facts of this case, the Court charges you that if you find by a preponderance of the evidence in this case, that the defendant's son is a

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boy 8 or 9 years of age, and if you further find from a preponderance of the evidence that said boy had a rifle and was shooting at birds and targets about his home in the city of Memphis, and you further find from the preponderance of the evidence that said boy's mother, the defendant, knew that he had said rifle and was so using it, and if you further find from the preponderance of the evidence that said boy was incompetent to be intrusted with a deadly weapon, and the defendant knew the danger or should have known it by the exercise of ordinary and reasonable care, and if you further find from a preponderance of the evidence that it was negligence on the part of the defendant to allow said boy to have and use said rifle, and you further find from the preponderance of the evidence that said boy was engaged with the companion in shooting said rifle, and while so engaged he or his companion shot the plaintiff and wounded him, then you should find for the plaintiff.

"On the other hand, gentlemen, if you find from the evidence in this case that the defendant didn't know that her said son had said rifle, or if you find from the evidence that said boy was competent to be intrusted with a dangerous weapon, then you should find for the defendant."

By the fourth and fifth assignments of error certain portions of the Court's charge are complained of as error.

We have examined the portions of the charge referred to in the assignments of error, and have reached the conclusion that when they are read in connection with the entire charge, there is no error in them.

It is insisted by the sixth assignment of error that the Court erred in failing to define to the jury properly the rule for determining the weight to be given the evidence adduced upon the trial, both by the plaintiff and defendant.

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The Court, in his general charge, instructed the jury that the burden of proof was upon the plaintiff to make out his case by a preponderance of the evidence. He further instructed the jury that, in determining upon which side of the controversy the preponderance of the evidence rested, the jury should take into consideration the relationship of the witnesses, if any, to the parties, and also the opportunity of the several witnesses for seeing and knowing the facts about which they testified, their conduct and demeanor while testifying; their interest, if any, in the result of the suit, and the probability or improbability of the truth of their several statements, in view of all the facts and circumstances proven on the trial.

There was no request made by the defendant for further instructions upon the question of how the jury should determine upon which side of the controversy the preponderance of the evidence was. In the absence of such a request, the Court cannot be put in error for failing to give more specific instructions. However, we think the instructions upon this point substantially covered the question.

It was insisted in oral argument at the bar of the Court that the judgment should be reversed, because the trial Judge failed to weigh the evidence upon the motion for a new trial and approve the verdict of the jury.

In answer to this criticism of the action of the trial Judge, it suffices to say that there is no assignment of error in the brief of counsel for plaintiff in error complaining of any failure of the trial Judge to weigh the evidence upon the motion for a new trial, and determine whether or not the verdict was supported by the evidence. Therefore, we will not inquire into this question. All matters complained of as error must be specifically pointed out by the party appealing in his assignments of error. The as-

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signments of error that were made by the defendant below have been considered and fully discussed in this opinion.

It results that we find no error in the judgment, and it is affirmed with costs.

E. A. GAYLOR v. LOUIS RIDENOW ET AL.

Affirmed substantially by the Supreme Court.

(Knoxville. September Term, 1913.

1. COUNTY HIGH SCHOOLS. *County Courts providing funds therefor. Abandonment.*

A County Court which has established and for some time maintained a system of county high schools may decline to vote funds or to levy a tax for the continuance of such schools; or, if an assessment therefor has been made, it may, before it has been certified to the trustee of the county for collection, be revoked.

2. SAME. *Discretion of justices.*

The Chancery Court is without power to control the discretion of justices in the matter of levying taxes for public purposes.

3. SAME. *Jurisdiction of Chancery Court to restrain misapplication of funds.*

A court of equity has jurisdiction to compel the application of all levies made by county courts for specific purposes to the purposes for which the levies were made; and if the justices undertake to divert the funds derived or to be collected for a

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special purpose to another purpose or for general county use, their action may be restrained at the suit of any taxpayer.

FROM CAMPBELL COUNTY.

Appealed from the Chancery Court of Campbell County. HUGH KYLE, Chancellor.

C. A. TEMPLETON for Complainant.

OWENS & TAYLOR and E. C. CARLOCK for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

AN original and an amended bill were filed in the above cause. They were dismissed on demurrer, and complainant has brought the case to us by appeal.

The purpose of the original bill was to compel the collection or to enforce collection of sufficient funds to continue a high school which had been set on foot during a preceding year. Complainant insists upon his right to file the bill upon the two grounds that it was the public duty of the justices to support this enterprise, and that he had been employed as a teacher and was entitled to a tax levy out of which his salary was to be paid.

An injunction was granted. On April 15th an amended bill was filed. The new matter alleged in this bill was in substance that the justices of the peace, or a majority of them, had, notwithstanding the injunction, passed in regular session the following resolution: "Resolved, that all former acts relative to the high school assessment be and are hereby rescinded, and that five cents of said assess-

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ment be and are hereby applied to the common schools and five cents to the public road." It was averred that said resolution was passed in violation of the injunction and was for that reason void, and that it was likewise void for the reasons set out in substance in the original bill. The prayer of this amended bill was in substance that the resolution be declared null and void, that an injunction issue restraining the justices who had voted for it and their agents and attorneys, carrying it out, and that they be restrained from transferring said high school tax to any other fund or for any other purpose. Complainant was afterwards permitted to amend his pleadings so as to aver specifically that he was a taxpayer of Campbell County.

The defendants interposed a demurrer, the pertinent portions of which were in substance that the County Court had the exclusive power to change, increase or lower taxes, that it was a legislative body which could not be controlled or harrassed by judicial interference, that the Chancery Court especially had no jurisdiction to interfere with its discretion, and that it had no power by injunction or otherwise to control the County Court respecting its method of levying taxes or making appropriations for high school purposes or otherwise. The learned Chancellor was of the opinion that the matters of demurrer above recited were fatal to complainant's bill and dismissed the same. He likewise adjudged that the defendants were not in contempt, for the reason that the injunction was void. From this decree complainant has prosecuted this appeal and asserts in an assignment of error that the decree was wrong in every respect. An able brief is filed in support of this position.

We are called upon to construe the County High School Act. It is unnecessary for us to do this elaborately. It

may be stated that the Act in brief authorizes the several County Courts to *provide* for the maintenance of a high school system and vests in the County Courts the power to make special levies for this purpose. A grand system of management, the details of which need not now be mentioned, is devised. The chief means of provision, aside from the revenue feature, is the creation of a board of education clothed with the power to arrange for buildings and for consolidations and for the grading of the schools in conjunction with the county superintendent.

The insistence of learned counsel for complainant is in brief that when a County Court establishes a high school system and maintains it for a while, it is bound to vote annually a sufficient amount of revenue for its maintenance; that this becomes an inviolable contract, and that it cannot by resolution or order fail to vote the requisite amount, and that it cannot after it once levies a special tax, revoke the same.

We have given this subject careful consideration, keeping in mind the powers of the County Court and the extent to which they are subject to judicial control. It has long been accepted in this State that they are miniature legislatures, and that within their peculiar sphere they are as free from judicial control as State Legislatures. It is well settled in this State that their discretion with respect to the levying of taxes cannot in general be controlled; that is, that they cannot be compelled by mandamus or injunction to vote for a levy or to increase or diminish it, provided, of course, they are acting within their sphere.

There is nothing in the High School Act, nor in any statute found by us which makes it obligatory upon a County Court, after it has maintained a county high school system for some years, to continue to vote funds or supplies therefor. We find nothing in this Act or in our

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system of jurisprudence or our polity which compels a County Court to vote funds whenever it deems it inadvisable to do so. To say that the justices must continue the maintenance of a school system that has been set on foot by them or maintained by them for a space of time would be to nullify completely their legislative character, and would bind them hand and foot as mere ministers instead of lawmakers. It was expressly ruled by our Supreme Court in the case of *State v. Justices of Wayne County*, 24 Pickle, 259, that the County Court which had embarked upon a public enterprise might at any time withdraw its support, although this withdrawal would leave incomplete and useless the enterprise set on foot. The reasoning of that case and of the decision referred to in the opinion is controlling with us in the case at bar to the extent that we must hold that the Chancery Court cannot compel a County Court to make an assessment for County high school purposes, nor enjoin it from *revoking an assessment* theretofore made. These are functions and powers beyond judicial control.

The insistence that the County Court is bound by our constitutional prohibition of the violation of contracts must, when the particular averments of this bill are kept in mind, be held untenable. The rule is universal that a legislative body cannot bind a future Legislature or a future meeting of the body by a contract respecting public expenditures except in very rare instances. In other words, no one acquires a vested right in the continuance of revenue levies for the payment of salaries or public expenses: *Pennie v. Reise*, 132 U. S., 464; *Bridge Company v. Dix*, 47 U. S., 6. The failure of an assessing or appropriating board to provide funds for *public institutions* and public functionaries is not a violation of the constitutional provision as to the sacredness of contracts: *Idem*. The

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rule is that until performance of services the legislative power may decline to pay or make arrangements for paying the servants of public institutions: *Hale v. Gaines*, 63 U. S., 22. It was held in our own State, in the case of *Morley v. Power*, 10 Lea, 219, that the district school authorities were not liable to a teacher for the amount of her salary or for the time of her contract when there were no funds out of which she could be compensated. But, however this may be, we are of the opinion that complainant has no standing against the county in this case, for the reason that it can hardly be said that there are any contractual relations between them, and that his complaint must be primarily to the board which engaged him.

To the extent that the Chancellor held that the Court had no power to prevent *revocation of the assessment* and a refusal to vote funds for the high school the majority of the Court are of the opinion that he was eminently correct. But upon another feature of the case; namely, the effort to restrain the transferring of this assessment from high school purposes to that of common school and public road purposes, the majority are of the opinion that the Chancellor's decree was not entirely sound. The High School Act expressly provides that the special fund levied and collected for high school purposes shall be kept separate and apart from other funds and shall be used exclusively for these purposes. That complainant as a taxpayer has the right to interfere and prevent the wrongful appropriation of any funds once devoted to county high school purposes, must be conceded as settled beyond controversy: *Railroad v. Hamblen County*, 7 Cates, 526; *Kennedy v. Montgomery County*, 14 Pickle, 179. While as a general rule the discretion of the County Court with respect to taxation will not be interfered with, the Courts will interpose to restrain a misapplication of funds. When

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a fund is by the County Court devoted to a specific purpose and when this fund has been raised under a special levy, the citizens of the county have the right to see that the fund is devoted to that specific purpose; and to this end they may invoke the injunctive powers of a Court of Equity: *Idem*. The law does not contemplate or tolerate the mixing of special funds with general funds, and when this is undertaken by the justices a Court of Equity can interfere. When the people consent to be taxed for any purpose they cannot complain. But when they are taxed for one purpose and the fund is applied to another purpose, they have both the right to complain and the right to redress. In the case cited, the Court acted prospectively—that is, decreed that all funds subsequently coming into the hands of the officers of the county pursuant to a special levy must be devoted to that specific purpose; and the justices were enjoined from thereafter directing the appropriation of special funds to general purposes.

It will be noticed that the resolution under consideration does not revoke the high school assessment. It still refers to the assessment as one made for high school purposes and then directs that one-half of it be devoted to common school purposes and one-half of it to public road purposes. If the justices had simply revoked the assessment we are of opinion that a Court of Equity could not interfere. But when they undertook to divide this assessment between roads and schools, they infringed the rights of complainant and other taxpayers, and subjected themselves to the restraining orders of the Chancery Court. Any citizen of the county may file a bill to prevent misappropriation of school funds: *Finney v. Garner*, 2 Cates, 67; 35 Cyc., 1048. Those who handle school funds may be enjoined from misappropriating them, and when funds are provided by assessment, it is the duty of the collecting

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officers to collect this particular assessment and hold it for the specific purpose for which it was made: *Wooley v. Hendrickson*, 73 N. J. Law, 14. But it must not be forgotten that the justices of the several counties are the voters of tax levies for county purposes, and that it is theirs to grant or withhold funds except where *inviolable* contracts are made or where *quantum meruit* claims arise and are reduced to judgment. With respect to such matters the justices of course may be mandamused.

A majority are of the opinion that there are sufficient equities averred in the bill in this case with respect to the attempt to divert the high school assessment to call for an answer, and that the cause will have to be remanded for answer upon this feature. We are of opinion that if the collecting officers of Campbell County collect this ten-cent levy, the funds must be appropriated and used for the maintenance of the high school system of the county for the 1913-14 term, unless it be shown that the April 8th action was understood and treated as a reassessment for public road and common school purposes. We are of opinion that if the justices had not prior thereto made an assessment for these two purposes, it might change the *assessment* for high school purposes to a levy for the other two purposes—that is, the resolution of April 8th might be treated, and it may have to be treated, as a rescission of the January high school assessment and the making of a new assessment for road and common school purposes. If they had theretofore made their regular assessments, their power was exhausted, and their April 8th resolution would be invalid if treated as a new or second assessment. So that, if the justices could not legally make a second levy for road and common school purposes, and this they could not do if they had prior thereto made the regular levy, or if the ten-cent assessment originally for the high school

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purposes would be in excess of the amount which they could levy for road and school purposes, then the county would have to abandon the collection of the levy under consideration, or else apply the funds collected, if collected, to high school purposes.

The cause is remanded with directions that the defendant answer this latter feature of the bill and to adjudge what shall be done upon this answer and any proof that may be offered. Defendants will pay the costs of this Court. The costs of the lower Court will be later adjudged by the Chancellor.

W. H. PURYEAR v. N., C. & ST. L. RY. ET ALS.

Writ of ceritorari denied by the Supreme Court.

See 127 Tenn., 133.

1. NEGLIGENCE. *Master and servant. General usage. Permanent structures.*

A railway company is not guilty of negligence in the erection and maintenance of a tipple extending over a sidetrack, if in its construction the company followed the design and arrangements used or observed by prudently managed railway companies with respect to such structures.

2. SAME. *Exception.*

Following the custom is generally the course of the careful and prudent person. But if the customary method is palpably hazardous, its observance will not free the party from the imputation of negligence.

3. SAME. *Assumption of risk. Informing servant of danger.*

Although a structure upon the master's premises be dangerous, the master may free himself from negligence in this par-

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ticular by fully informing his servants of its nature and its hazards.

4. SAME. *Methods of doing business and manner of constructing buildings and equipment.*

Until ordered by statute, masters may arrange their plants and conduct their business in their own way, and cannot be required to change them to suit the varying standards of juries; provided, of course, their plants and methods are not clearly unsafe and unsuitable.

5. SAME. *Rules. Duty of servant to become familiar with permanent structures.*

A master may require a servant, before entering upon the discharge of his duties, to familiarize himself with the permanent structures of his plant—e. g., overhead structures; and the master may reasonably rely upon the observance by the servant of the location and condition of such structures while performing his duties.

6. NEGLIGENCE OF MASTER. *Reliance upon servants following instructions.*

In passing upon the question of the negligence of a railway company in maintaining a tipple at a dangerously low elevation above a sidetrack, the fact that the company required trainmen to ascertain the elevation and to conduct themselves accordingly, is of vital importance, especially if the servants are afforded an opportunity to protect themselves while passing beneath and are not expected to pass under at high rates of speed and while absorbed in their duties. There may be a difference with respect to structures on the main line of a railway.

7. SAME. *Assumption of risk of structure over sidetrack. Knowledge of height.*

A trainman who is required by the rules of the railway company to ascertain and keep in mind the height of a tipple over a sidetrack, and who admits that he knew its height, will be held to have assumed the risk of being struck by the projection while standing on passing trains.

8. SAME. *Contributory negligence.*

And such trainman will also be held guilty of proximate contributory negligence if, notwithstanding his knowledge of the

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location and height of the structure, he, just before his car is to pass beneath, needlessly or carelessly mounts a high and dangerous part of the car and strikes his head against the lower beams.

9. SAME. *Hurry order.*

The questions of assumption of risk and contributory negligence are always influenced or shaded by a *hurry* order while obeying which a servant is injured. But notwithstanding a hurrying order by the conductor, a trainman is guilty of contributory negligence in not using reasonable care to avoid striking an overhead structure which he sees in ample time to miss, especially if he had agreed with the company to keep a lookout for the structure and avoid collision therewith. And if he, before his car reached the tipple, saw it in time safely to miss it, but looked at it, and decided that he could stand up and still avoid striking it, and elected to so pass under, he will likewise be held to have assumed the risk.

10. SAME. *Contributory negligence in executing command.*

A servant to whom a command is given without directions as to how the same shall be executed, may be found guilty of contributory negligence if he, with full knowledge of numerous safe ways of performing the duty, elects to take that one which he knows is attended with danger.

11. DEFENSES OF ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE.

Until otherwise commanded by the Legislature, the courts of this State are bound to apply the defenses of assumption of risk and contributory negligence whenever invoked by employers, provided, of course, the facts call for their application.

FROM DAVIDSON COUNTY.

Appeal in error from the Circuit Court of Davidson County. T. E. MATTHEWS, Judge.

Puryear v. Railway.

W. H. WASHINGTON and B. D. SHRIVER for Plaintiff
in Error.

PENDLETON & DEWITT for the Stone Company.

CLAUDE WALLER and FRANK SLEMONS for the Railway
Company.

MR. JUSTICE HIGGINS delivered the opinion of the
Court.

DEFENDANT in error recovered of the plaintiffs in error a verdict for \$7,500 for alleged personal injuries. A motion for a new trial containing many specifications of error was filed. All grounds were overruled by the trial Judge excepting that one in which the amount of the verdict was assailed. Upon remittitur of \$2,500 a judgment for \$5,000 was pronounced. To reverse this judgment plaintiffs in error are prosecuting this appeal. The first error pressed upon our attention is predicated upon the action of the Court in declining to grant motions for peremptory instructions.

We shall at different points in this opinion refer to the facts upon which this assignment is based.

The railway company has at a point not far from Newsum's Station, on its western division, a siding which goes by the name of Fuller's. This siding or switch was put in for the purpose of connecting with the main line a curved side track extending westward to a rock crusher and tipple owned and operated by its co-defendants. This tipple extends over this siding at a point where the rock crusher is operated and in a manner forms a bridge-like or tunnel-like structure over the railway track. It is about thirty-five feet in length and is sixteen feet and a few inches above the top of the rails.

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Defendant in error for some two or three years prior to April, 1911, and on that day, was in the service of the railway company as a brakeman. On the day mentioned while standing on the tender of an engine engaged in switching at the tipple, his head struck the upper portion and he was injured.

The evidence is virtually one way that the uniform height of these structures is sixteen feet above the rails. The fact that a tipple at another place was higher and the fact that like structures upon main lines were higher do not destroy the effect of the testimony that the uniform height of tipples of this class erected at places such as this are sixteen feet. It is not controverted that the use of box cars was never contemplated. It is likewise undisputed that this siding was used for no other purpose and that there was nothing concealed or unusual about this structure. At the time of the injury it was in good shape. Many reasons are given for the construction of tipples of this kind at a height of sixteen feet. It was admitted that they could be built at a higher standard, but that this would cost a considerable sum in addition without commensurate advantages, and that it would strain the timbers of the structure to have them any higher; and likewise that it would batter down and wear out the cars into which the stone was to be poured. As was said by the learned Chief Justice Stone in the case of *Railway v. Hall*, 4 L. R. A., 714, railroads are excused from putting necessary structures at a high altitude if so doing resulted in great inconvenience and entailed great expense; provided always, the companies notified their servants of the situation and afforded the opportunity of knowing the dangers to be apprehended.

With respect to the opportunity Puryear had of knowing and appreciating the dangers of the situation, it is best

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to set forth the substance of his testimony. He states that when he passed beneath the structure several minutes before his injury, he looked at it. He also admits that while he was in the act of coupling and uncoupling upon the far side, he looked at it and its dimensions and concluded that it would be safe for anyone to pass beneath it on top of an engine tender. To show his knowledge of the situation reference may be had to his statement to the effect that within a few yards of the tipple he was informed by his co-servant that he was in danger of being struck by the sides of the tipple. He does not controvert the fact that he all along knew of the presence of this tipple and had an opportunity to *judge* of its height. An effort is made to show that the injury occurred at a time when it was quite dark. This is not important as a factor in view of his admission that the outlines of the tipple were before him, that he had been warned of the danger of his position, and that he had theretofore examined the tipple and formed an opinion as to its aspects of danger. It is not contended of course that he knew exactly its height or had ever measured it.

Puryear states that he was commanded to act in a hurry and that he was executing an order, and that his attention was engrossed thereby when he was hurt. He asserts that when he mounted the tender and stepped upon the coal he was pursuing what he thought was the command of the conductor. The conductor gave him a general order only. He was left to his own judgment as to the method which he would adopt in communicating with the engineer. It is quite singular that he was undertaking to get to the engineer for the purpose of telling him to be in a hurry when the engineer was just as cognizant of the necessity of hurrying as he, and when the engineer was in fact hurrying toward the main line without the communication to

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him of any other order than that of a go-ahead. But taking the contention of defendant in error as true, he had the option to select several methods of communicating with the engineer. There was certainly no language ascribed to the conductor which furnished any foundation whatever for Puryear's contention that he was commanded to mount the tender and walk upon the coal piled up and thus reach the engineer. It is admitted by Puryear that the engine was standing still when he uncoupled and gave the go-ahead signal to the fireman, and that he was within about thirty feet of the fireman when this signal was given. It is palpable that he could within one-half second have communicated with the engineer the message of the conductor. But supposing that he had the right to mount the tender and get into the cab for the purpose of communicating with the engineer, there is nothing to suggest either in the circumstances or in the alleged hurry order of the conductor that he mount the high pile of coal just at the moment the engine was passing under the tipple.

Puryear admitted that he was furnished with a copy of the rules of the company, and was required to read them and keep them in mind, and that he was repeatedly examined respecting them. The rule peculiarly applicable was the one which required him to inform himself of the location of all bridges, obstructions and structures on and near the track and to acquaint himself with the attendant dangers and to conduct himself accordingly. He admits his familiarity with the rule. While learned counsel referred to the case of *West v. Railroad*, 179 Fed., 801, as authority for the proposition that such a rule does not excuse the master from the duty of warning a servant of the danger of overhead structures, we are of opinion that the rule is an important factor as bearing directly upon the exercise of due care upon the part of the master, and also

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as touching the assumption of risk and contributory negligence of the servant. A master may require his servant to acquaint himself with the master's premises.

Is the defendant in error entitled to a recovery? A vast array of authorities sustaining and denying this right is presented to us. It strikes us that the proper thing to do is to look at the peculiar facts of this case through our own eyes, and then ascertain whether any particular rule or set of rules governs, and not attempt to warp the facts so as to suit the authorities. The authorities may afterwards be profitably considered. It is quite an easy matter to cite an authority as controlling by ignoring exceptions or qualifying circumstances.

We have adopted in this State as the unbending test of negligence the average or customary conduct of the ordinarily prudent man. It is always competent, even for masters defending actions of negligence brought by their servants, to show that they in the particular conduct under investigation pursued the method or used the appliances adopted by ordinarily careful and prudent men in like employment. This doctrine, announced in numerous decisions and text-books, has been more than once approved by our Courts.

This doctrine of custom, of imitation, of following in the footsteps of predecessors and contemporaries, in other words, of following the fashion, cannot be eradicated from the law of negligence. It arises from the very nature of humankind. We are imitative creatures, a trait recognized by early jurists. An employer whose machinery and appliances are such as his neighbors have been in the habit of using may generally consider himself as discharging his duty to those whom he engages. This rule is always qualified by the further proposition that if the method adopted is fraught with danger to servants exercising ordi-

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nary care, or is inherently perilous to those exposed thereto, the master will not be freed from the imputation of negligence by following the custom. And yet, although the method adopted by the master may be fraught with danger, if he informs his servants of the dangers or affords them an opportunity to know of them and exacts of them the duty of ascertaining these dangers, liability for injury cannot well result.

Another rule of the common law is that an employer may use such methods and patterns as suit his own notions of safety and convenience, provided he does not expose his servants to hazards not ascertainable upon afforded opportunity. The master designs his structures with the view of carrying out his purposes effectively, efficiently and profitably, and he is not required to alter his permanent structures or to change his instrumentalities in accordance with the wishes of his servants, or at the behest of the different juries of his jurisdiction. The foregoing remark must always be understood as shaded or qualified by the rule that the master must exercise reasonable care for the safety of his servants, and is not excused by following customs that are clearly dangerous, and must not expose his servants to *unnecessary* hazards. These propositions are also qualified by the further rule that if the master's permanent structures are the source of danger to the servants, he must inform them thereof or afford them an opportunity to learn of them and thus enable the servants to contract with reference thereto.

Able counsel for defendant in error place great stress upon the proposition laid down in the Neenan case that the master had no right to expose his servants to unnecessary hazards, and that he violates his duty if he erects on or near or over the place of work an unnecessary structure which might prove to be a source of danger. Granted

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this, the rule is not applicable here for the reason that this structure is not an unnecessary one, nor does the proof show that it was placed unreasonably lower than it should have been. It must be admitted that the structure could have been made 18 feet high, but the proof negatives the necessity of this elevation. It was shown that the higher the elevation the greater the strain on the timbers and the sooner would the cars into which the stone was loaded be worn out. It cannot be said that the Court by so holding is sanctioning the preservation of property or the making of money at the expense of human life. We are simply reiterating the incontrovertible proposition that a master may follow the ordinary method of constructing his appliances, having in view the demands of trade, provided there is nothing inherently dangerous in his method; and if the servant contracts with reference to this method and is afforded an opportunity to acquaint himself with the dangers, the master cannot be charged with negligence if his structures are reasonably safe as tested by the conduct of the average prudent man. Especially is this so if he has the right to assume that his servant is cognizant of the situation and appreciates the dangers. The following authorities, in addition to those cited, have a direct bearing upon the propositions above laid down: Bailey on Personal Injuries, Vol. 1, 376; *Titus v. Ry.*, 136 Pa. St., 618; 20 Am. St., 944; *Logging Co. v. Schneider*, 74 Fed., 185; *Sheeler v. Ry. Co.*, 81 Va., 188; 59 Am. Rep., 654; *Baylor v. Ry.*, 29 Am. Rep., 208, and cases there cited; *Purdy v. Elec. Co.*, 51 L. R. A., 881; Labat, 263-264; Elliott on Ry., section 1269, and numerous other cases which could have been referred to. Learned counsel for defendant in error in their splendid brief quote at length from the case of *Ry. v. Wright*, 16 N. E., to the effect that a railroad company which maintains a structure so

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low as to endanger trainmen while discharging their duties is guilty of negligence. In the decision the absence of proof of the custom to build structures of the height of the one under consideration was commented upon. The clear inference is that if the bridge which knocked the injured one off had been constructed of the height uniformly observed by railroads of the country, the Court would have held that there was no negligence. Reference is also made to the fact that if it had been shown that the bridges customarily erected were necessarily dangerous to brakemen in the ordinary discharge of their duties the master might be held liable. But we have the distinguishing feature between the cited case and the one at bar of the fact that in that case the bridge was on a main line and that the servant was engaged in the regular performance of his duties, while here the injured servant may be said to have been irregularly performing and that the structure was on a spur track at which slow switching was to be carried on, and at a place at which all brakemen were afforded the opportunity to see and appreciate the danger and were given time to protect themselves from injury.

These last named features may here and now furnish the distinguishing grounds of practically all the cases cited by learned counsel for defendant in error respecting the construction of low bridges. One other case cited by them must be specifically treated, that of *Ry. v. Jones*, reported in 192 Fed., 796.

Can it be said that those who constructed this tipple should have anticipated that a brakeman would get in the position occupied by Puryear at the time he was injured? For if this would not have been anticipated by the ordinarily careful and prudent man; if this occurrence or an occurrence of similar kind could not reasonably have been

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foreseen, there is absent the foundation for the imputation of negligence. Considering the infrequency of switching and the means afforded the trainmen for caring for themselves, and also the evidence as to the customary height, we do not think twelve men were justified in saying that the plaintiffs in error were guilty of failing to exercise ordinary care for the safety of trainmen who themselves were exercising ordinary care.

Taking up the question of assumption of risk, we feel constrained to hold that the defendant in error assumed the hazards of this structure. In the first place, it was a permanent structure erected pursuant to a common design and had been in use for several years, and the likelihood of being hit while standing high up on cars was an ordinary risk. He knew that it was there and also the purpose for which it was used, and he was also aware of the methods of its use and of what was necessary for trainmen to do to avoid injury.

It is urged by learned counsel that he was executing a hurry order of the conductor. This contention has virtually nothing to stand upon in fact, even if it were considered of controlling importance. Granted that he was in a hurry and that he was endeavoring to get to the engineer, he admits that he knew of the tunnel, and that he saw its outlines and had an opportunity to judge of it as a possible source of harm. His contention that he overlooked the presence of the tunnel is destroyed by his admission that he saw it, looked at it and was warned of it within fifty or sixty feet of its entrance. The hurry order factor must necessarily pass out. A further reason why this hurry up proposition is wholly inconsistent with the facts is that he had every opportunity to communicate this order to the engineer without mounting the coal pile for that purpose. One other consideration as bearing

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upon the question of assumption of risk must not be overlooked, and this factor is one that we have not yet seen elaborated in any adjudged case; namely, that of the requirement of the master that the servant shall inform himself of the location and proximity to the track of all permanent structures and to take care to avoid injury therefrom. This rule might not exempt a railway company in all instances, as was held in the West case, *supra*, but we see nothing unreasonable in holding that the master may require this of a servant, and may rely upon its performance by the servant, provided the servant be afforded the opportunity, as was done in the instant case. This has a direct bearing upon the question as to whether the master discharged his duty of ordinary care, for if the master may require of the servant an inspection of his permanent structures, and affords him an opportunity to do so before exposure to risks, the master may act upon the assumption that the servant has acquainted himself with the hazards and will take them into his calculations. In other words, if there is danger attendant upon the method of doing the work and the servant has been told to acquaint himself with these dangers, the master may rely upon the assumption that the servant is cognizant of the dangers and agrees to assume them.

Bearing upon his contributory negligence it may be said that he knew that he was approaching the tunnel. He admits having taken a view of it and having decided that he could go through in safety. He is unable to deny the fact that if he had stopped or if he had not mounted the coal he would not have been hurt. He also admits that he could have waited until he got beyond the tunnel before going over to the engineer. Nor can it be disputed that he could have delivered this message from the ground and thus rendered unnecessary his mounting of the engine.

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He admits also his familiarity with the rule calling his attention to dangers of overhead bridges and obstructions and to exercise ordinary care with this knowledge in view. A recital of these surroundings makes inevitable the conclusion that he was guilty of proximate contributory negligence, and that the Court should have so held as a matter of law. He again appeals to the direct command and hurry order feature and also to the fact that he thought he was executing the command of the conductor and that he performed this duty in the customary way. He further contends that he had the right to assume that the conductor intended for him to mount the engine and communicate with the engineer. He is not warranted in making these assertions. Granting in part his insistence, there is presented the situation of a servant who is given an order to execute, but with no specific directions as to how it should be carried out, with the option to execute it in several different ways just as he might deem best. There is also present the actual or imputed knowledge of the servant of the dangers attendant upon all the ways in which he might execute the order, and especially knowledge of the fact that two or more ways, at least one of which was safe, were open to him. If so, there is no room to dispute the proposition that the servant either assumed the risk of the way in which he undertook to perform, or was guilty of contributory negligence in selecting a dangerous way of performing.

It was said in *Ry. v. Rowan*, 104 Ind., 88, that a railway company complied with its duty respecting overhead structures if it built them in such a way as that the servants might perform all their duties in the movement of trains with reasonable safety while performing their duties in the manner and with that degree of attention which the master had the right to expect and require of them. As-

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suming this as a correct statement of the rule, the evidence in the case at bar does not show a breach of duty, for the reason that there would have been no peril to Puryear if he had exercised ordinary care and had not undertaken to perform an act at his own election and in an unusual and unanticipated way. Nor are the plaintiffs in error for many reasons referred to in this opinion, guilty of maintaining what is denounced in *Ry. v. Irvin*, 16 Pacific, 479, a mantrap in the shape of an overhead structure. Here the builders had in contemplation mere switching operations upon low cars and with opportunities afforded the servants to ascertain the dangers of the situation and hold themselves accordingly. By way of reiteration, it is most earnestly pressed upon us that plaintiffs in error could have constructed this tippie eighteen feet high and thus put injury therefrom beyond the range of possibility. But this is not the test of duty. It is not whether they could have done so, but whether they should have done so in the sense of "oughtness" as used by ethical-philosophical jurists. All that plaintiffs in error were required to do was to follow the practicable and customary design. An accident such as happened to Puryear was not any sort of probability to a servant remembering the instructions of his master and observing his rules. Hence, there is no predicate of negligence found in the fact that the structure was not seventeen or eighteen feet high.

It is hardly necessary for Courts ever to respond to sociological criticisms upon well established rules of law. But in the instant case the defenses of assumption of risk and contributory negligence are assailed with unusual vigor and ability, accompanied with the insistence that they should be circumscribed by the Courts to the minimum point. We agree with learned counsel that these

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rules should not be applied unless the facts clearly call them forth, and they would not have been regarded by us seriously had not the undisputed facts rendered their application unavoidable. When such is the case, we are aware of no way of evading these well established principles of law. Whatever view may be taken of them as guides to conduct, we are juridically constrained to act upon the assumption that every freeborn American citizen may expressly or impliedly contract to assume the risks of his employment, and further agree to take the consequences both in a legal and physical sense. And we are still bound to hold that every laborer must exercise ordinary care and prudence in the discharge of his duties, and to demean himself in that way and manner which he contracted with his employer to observe. The destruction of the defenses of assumption of risk and of contributory negligence is sought in many quarters, but until they are stricken down by legislative act the Courts of this State are bound to recognize them, judge-made as they are. Our Courts are also bound to recognize the common law rule that a master can be held liable for his faults only, and that he may be excused from answering for injuries occasioned by the negligence of the servant himself. Whether a change in these matters and the adoption of an absolute liability regardless of fault shall in the long run benefit society is a point about which differences of view may be entertained. It may be that social justice and social conditions require it. But this much may be said, that a perceptible degree of the strength and vigor of Anglo-Saxon peoples may be attributed to freedom of contract with respect to risks and to the duty to take care in all situations in life. These are what may be termed cultural forces, such as are recognized by jurists as contributing toward improvement in individuals and in peoples. Their abolition will

bring about a reverse change from contract to status, from individuality to classism and solidarity, to a dull dead level of dispensation of charity upon the one hand and recipients of pensions and bounties upon the other without reference to grade or desert. But this is purely a legislative matter. These remarks were called forth by earnest appeals of learned counsel to exalt humanity above property. That certainly must be done, and that is what this Court always undertakes to do, considering the eternal principles of justice as an indispensable factor in human affairs; and it is for this very reason that right and justice as prescribed by law must be administered without reference to individuals or to classes. Nor must it be forgotten that it is the duty of the Courts to approach as nearly as possible the theoretical equality of persons in this country. To do otherwise is to inject classism. It must be remembered that there are no fixed social divisions among us other than those of a moral or intellectual nature. The mechanic of today may be the employer of tomorrow, and it is often the case that the son of the laborer may in after years become the master and operator. Hence, the necessity of a uniform rule and of the administration of justice.

It is not necessary that we treat the specific points urged by learned counsel for the Crushed Stone Company other than the one that if the railroad company be held not guilty of violating any duty toward Puryear, then the stone company as a co-operator cannot be held liable. Nor is it requisite that we refer to the numerous assignments of error made by both of the appealing parties. We feel constrained to hold that as a matter of law defendant in error is not entitled to a recovery and that His Honor the trial Judge should have so held. The judgment is reversed and the suit dismissed at the cost of Puryear.

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LX. 11/14/15.
C. W. D..

